Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BOARD OF TRUSTEES OF
SOUTHERN ILLINOIS UNIVERSITY,

Petitioner,

vs.

THEODORE F. WICHMANN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Congress abrogate the States' sovereign immunity under the Eleventh Amendment of the United States Constitution from suit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment of the United States Constitution as required by *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996)?

LIST OF PARTIES

This action was filed by Respondent Theodore F. Wichmann ("Wichmann") against Petitioner Board of Trustees of Southern Illinois University ("SIU"). SIU is a body politic and corporate and an arm of the State of Illinois. 110 ILCS § 520/1, et seq.; *Cannon v. University of Health Sciences/Chicago Medical School*, 710 F.2d 351, 356-57 (7th Cir. 1993).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Board of Trustees of Southern Illinois University ("SIU") respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit which affirmed the district court's denial of SIU's Eleventh Amendment sovereign immunity defense.

OPINIONS BELOW

The Seventh Circuit opinion herein is published at 180 F.3d 791 (7th Cir. 1999), and is reprinted in the Appendix ("App.") at page 1. Opinions of the district court are the July 1, 1997 Amended Judgment and Order, the June 27, 1997 Memorandum and Order, the May 23, 1997 Judgment and Order, the May 23, 1997 Memorandum and Order, and the August 1, 1996 Memorandum and Order, which are reprinted in the Appendix at pages 29, 31, 39, 41 and 58, respectively.

JURISDICTION

On June 7, 1999 the Seventh Circuit issued its opinion herein. (App. at 1). SIU invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the U.S. Const. art. I, § 8, cl. 1, the U.S. Const. amend. XI and XIV, the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), the Fair Labor Standards Act, 29 U.S.C. § 216(b), and certain provisions of the Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, Section 28, 88 Stat. 55, which are reprinted in the Appendix starting at page 64. 28 U.S.C. § 2403(a) may also apply because this petition questions the constitutionality of an Act of Congress. The Seventh Circuit did not certify to the Attorney General that the constitutionality of an Act of Congress was drawn into question.

STATEMENT OF THE CASE

A. Factual Background

SIU is a state institution of higher education. Theodore Wichmann was employed by SIU as the Associate Director of SIU's Touch of Nature Environmental Center when his position was eliminated in August 1994, and he was notified that he would be terminated. Wichmann asserted that SIU's decision to terminate him was due to his age (48). (App. at 2).[1]

[1] Citations to the opinions included in the Appendix attached hereto will be referenced "App. ___." Citations to documents in the record will be by abbreviated description and the district court docket number designated "D. No. ___."

B. Procedural Background

1. District Court Proceedings

On May 18, 1995, Wichmann filed suit against SIU alleging that his age (48) was a motivating factor in SIU's decision to eliminate his position and terminate him in violation of the ADEA. Wichmann sought back pay, liquidated damages, attorneys' fees and reinstatement. (Compl., D. No.1). On July 11, 1996, SIU moved to dismiss Wichmann's claim as barred by the Eleventh Amendment of the United States Constitution pursuant to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). (Mot. to Dism., Suppl. Memo., Reply and Suppl. Mem., D. Nos. 34, 35, 46 and 50). The district court denied the motion. (Order, D. No. 51, App. at 58). The liability aspect of Wichmann's claim was tried to a jury, which found in favor of Wichmann on his claim that SIU violated the ADEA. (Trial Trans., D. No. 73; Verdicts, D. Nos. 73 and 74). The remedy was tried to a magistrate. (Damages Trans., D. No. 79). On May 23, 1997, the magistrate entered judgment awarding Wichmann back pay of $93,202.02, liquidated damages in an equal amount, damages at the rate of $151.31 per day from judgment to reinstatement and ordered reinstatement. (Order, Mem., D. Nos. 85 and 86, App. at 39 and 41). Post-trial motions were filed by SIU and Wichmann. (SIU Mot., Suppl. Memo., D. Nos. 90, 91; SIU Mot., D. No. 92; Wichmann Mot., Supp. Memo., D. Nos. 87, 88). On June 27, 1997, the district court denied in pertinent part SIU's post-trial motion, granted in pertinent part Wichmann's post-trial motion and granted a stay as to the damage award, but not reinstatement. (Amended Mem. and Order, D. No. 95,

App. at 31). On July 1, 1997, the district court entered an amended judgment in accordance therewith. (Amended Judgment and Order, D. No. 96, App. at 29). On July 11, 1997, SIU timely filed a Notice of Appeal. (Not. of Appeal, D. No. 97). On July 30, 1997, SIU moved the Seventh Circuit to stay reinstatement pending appeal, which motion was granted by the Seventh Circuit on August 11, 1997. (Motion and Order, Seventh Circuit).

2. The Seventh Circuit Decision

On June 7, 1999, the Seventh Circuit affirmed, the district court's denial of SIU's Eleventh Amendment sovereign immunity defense. *Wichmann*, 180 F.3d at 800 (App. at 14). The Seventh Circuit held that Congress had unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity from suit under the ADEA when Congress amended the ADEA in 1974 to expand the definition of "employer" to expressly include "a State or political subdivision of a State or any instrumentality of a State." *Wichmann*, 180 F.3d at 798 (App. at 10). The Seventh Circuit also held that Congress acted within its Section 5 remedial and preventative powers to enforce the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity from suit under the ADEA. *Wichmann*, 180 F.3d at 800 (App. at 14). The Seventh Circuit thereby concluded that Congress clearly abrogated the States' sovereign immunity from suit under the ADEA pursuant to a valid exercise of its

enforcement powers under Section 5 of the Fourteenth Amendment. *Id.* (App. at 14).

REASONS THE COURT SHOULD GRANT SIU'S PETITION FOR A WRIT OF CERTIORARI

A. This Court Has Recently Granted a Petition for a Writ of Certiorari on the Identical Issue in *Kimel v. State of Florida Bd. Of Regents* to Settle a Conflict Between the Courts of Appeals

This Court has granted a petition for a writ of certiorari in *Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir.), *rehearing en banc denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 90 (U.S. Jan. 25, 1999), to determine whether the Court of Appeals for the Eleventh Circuit properly held that Congress did not abrogate the States' Eleventh Amendment immunity from suit under the ADEA pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment. The Seventh Circuit decision in *Wichmann*, which presents the identical issue, is in conflict with the Eleventh Circuit's decision in *Kimel*. Therefore, the Court should either grant SIU's petition herein and consolidate *Wichmann* with *Kimel*, or hold the petition herein pending the Court's decision in *Kimel* and dispose of this petition consistent with this Court's decision in *Kimel*. *See Lehman Bros. v. Schein*, 416 U.S. 386, 387 (1974) (petitions for certiorari in three cases raising identical issue were granted and consolidated for oral argument).

B. The Seventh Circuit Holding in *Wichmann* That Congress Unequivocally Expressed its Intent to Abrogate the States' Eleventh Amendment Sovereign Immunity from Suit When it Amended the ADEA Conflicts with the Eleventh Circuit Decision in *Kimel* and the Eighth Circuit Decision in *Humenansky v. Regents of the Univ. of Minn.*

SIU has asserted herein that Congress did not unequivocally express its intent to abrogate the States' Eleventh Amendment sovereign immunity from suit under the ADEA when it amended the ADEA in 1974. The Seventh Circuit rejected SIU's argument, holding that Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity from suit under the ADEA when Congress amended the ADEA to expand the definition of "employer" to expressly include "a State or political subdivision of a State or any instrumentality of a State." *Wichmann*, 180 F.3d at 798 (App. at 10). The Seventh Circuit opinion in *Wichmann* in this regard conflicts with the Eighth Circuit and Eleventh Circuit decisions in *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998) (rehearing and suggestion for rehearing *en banc* denied) and *Kimel, supra*.[2]

In *Humenansky*, the Eighth Circuit held that the ADEA does not reflect an unmistakably clear intent to

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[2] The Seventh Circuit opinion in *Wichmann* in this regard is consistent with decisions of the Second, Fifth, Sixth and Ninth Circuit Courts of Appeals. *Cooper v. N.Y. State Office of Mental Health*, 162 F.3d 770 (2nd Cir. 1998); *Scott v. Univ. of Miss.*, 148 F.3d 493 (5th Cir. 1998); *Cogar v. Bd. of Regents*, 154 F.3d 296 (6th Cir. 1998); *Keeton v. Univ. of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998).

abrogate the States' Eleventh Amendment immunity from suit. *Humenansky*, 152 F.3d at 825. The Eighth Circuit reasoned that the Fair Labor Standards Act Amendments of 1974 (the "Amendments"), Pub. L. No. 93-259, Section 28, 88 Stat. 55, expanded the ADEA's definition of "employer" to include a state entity, but left *unamended* the section of the ADEA involving jurisdiction (29 U.S.C. § 626(c)), which continued to allow for enforcement of the ADEA "in any court of competent jurisdiction." *Id.* The Eighth Circuit noted that this contrasted with Congress' amendment of the jurisdictional sections governing the FLSA (29 U.S.C. § 216(b)) to permit suit to be brought under the FLSA "against any employer (including a public agency) in any Federal or State court." *Id.* The Eighth Circuit concluded that if Congress intended to abrogate the States' Eleventh Amendment immunity from suit under the ADEA, as it intended to do with respect to the FLSA, then Congress would similarly have amended the ADEA provision that most directly addressed the question of federal court jurisdiction (29 U.S.C. § 626(c)). Congress did not. *Id.* The Eighth Circuit concluded that a possible legislative oversight did not reflect the necessary "unmistakably clear" intent to abrogate the States' Eleventh Amendment immunity from suit under the ADEA. *Id.*

Similarly, in *Kimel*, the Eleventh Circuit also held that Congress did not unequivocally express its intent to abrogate the States' Eleventh Amendment sovereign immunity from suit under the ADEA. *Kimel*, 139 F.3d at 1433. The Eleventh Circuit reviewed the Fair Labor Standards Act Amendments of 1974 and held that merely including the States in the definition of employers under the ADEA

did not sufficiently show an unmistakenly clear intent to abrogate the States' Eleventh Amendment immunity from suit under the ADEA. *Kimel*, 139 F.3d at 1432.

SIU submits that the decisions in *Kimel* and *Humenansky* are consistent with this Court's decisions. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court articulated a two prong test to determine whether Congress abrogated the States' Eleventh Amendment immunity from suit pursuant to a valid exercise of power. The first prong of the *Seminole Tribe* test requires the court to determine "whether Congress has '*unequivocally* expresse[d] its intent to abrogate the immunity.' " *Seminole Tribe*, 517 U.S. at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)) (emphasis added) (cites omitted). In this regard, this Court instructed that "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.' " *Seminole Tribe*, 517 U.S. at 55 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991)). Similarly, this Court had earlier held that Congress' abrogation of the States' Eleventh Amendment immunity must be "unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

Moreover, this Court has long held that the courts "should not quickly attribute to Congress an *unstated* intent to act under its authority to enforce the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (quoting *Pennhurst State School & Hospital v. Halderman*,

451 U.S. 1, 16 (1981); emphasis added).[3] In *Atascadero*, this Court held that a general authorization for suit in federal court against "*any* recipient of federal assistance" was not "sufficient to abrogate the Eleventh Amendment," even though the State was a recipient of federal aid. *Atascadero*, 473 U.S. at 246 (emphasis added). Again, in *Dellmuth v. Muth*, 491 U.S. 223 (1989), notwithstanding numerous references to "the States" in the Education of the Handicapped Act ("EHA"), the legislation at issue, this Court explained that "it could not be said with perfect confidence" that Congress intended to abrogate the States' immunity, and "imperfect confidence will not suffice." *Dellmuth*, 491 U.S. at 231. Observing that the "EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity . . . Nor does any

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[3] A review of earlier cases addressing Congress' exercise of its powers under the Fourteenth Amendment suggests that such exercise has been recognized *only* when Congress explicitly articulated its intent to legislate pursuant to its Section 5 powers. *Compare Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1972 Amendments to Title VII of the Civil Rights Act of 1964), *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970) (Voting Rights Act amendments of 1920), and *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966) (Voting Rights Act of 1965), *with Pennhurst*, 451 U.S. at 15-16 (Developmentally Disabled Assistance and Bill of Rights Act). In *Fitzpatrick*, *Mitchell* and *Morgan*, where the Court upheld the validity of the legislation at issue as applied to the States, the Court was dealing with statutes in which Congress explicitly articulated its intent to legislate pursuant to its powers under Section 5 of the Fourteenth Amendment. On the other hand, in *Pennhurst*, the Court concluded that "because Congress *nowhere stated its intent* to impose mandatory obligation on the States under its § 5 powers, we concluded that Congress did not do so." *Gregory*, 501 U.S. at 469 (citing *Pennhurst*, 451 U.S. at 16).

provision cited . . . suggest abrogation in even oblique terms, much less with the clarity *Atascadero* requires," this Court concluded in *Dellmuth* that Congress had not unambiguously expressed its intent to abrogate the States' Eleventh Amendment immunity from suit under the EHA. *Dellmouth*, 491 U.S. at 231.

Given the clarity required by *Atascadero, Dellmuth,* and *Seminole Tribe,* SIU submits that the Eighth and Eleventh Circuit Courts of Appeals correctly concluded that Congress did not *unequivocally* express its intent to abrogate the Eleventh Amendment sovereign immunity of the States from suit under the ADEA simply by adding the States to the definition of employer. The Seventh Circuit's contrary conclusion herein is erroneous. This Court should grant SIU's petition for a writ of certiorari to resolve the conflict between the Seventh, Second, Fifth, Sixth and Ninth Circuits and the Eighth and Eleventh Circuits on this issue.

C. The Seventh Circuit Holding in *Wichmann* That Congress Extended the ADEA to the States Pursuant to a Valid Exercise of Power under Section 5 of the Fourteenth Amendment Conflicts with the Eighth Circuit Decision in *Humenansky*, as well as with a Concurring Opinion of the Eleventh Circuit in *Kimel*

SIU has asserted alternatively herein that Congress *could not* have effectively extended the ADEA to the States pursuant to a valid exercise of its powers under Section 5 of the Fourteenth Amendment. The Seventh Circuit also rejected SIU's alternative argument, holding

that Congress had effectively abrogated the States' Eleventh Amendment immunity pursuant to its Section 5 enforcement powers. *Wichmann*, 180 F.3d at 800 (App. at 14). The Seventh Circuit decision in this regard conflicts with the Eighth Circuit decision in *Humenansky*, as well as with a concurring opinion of the Eleventh Circuit in *Kimel*.[4]

In *Humenansky*, the Eighth Circuit held that even if the ADEA's text contained a sufficiently clear expression of an intent by Congress to abrogate the States' Eleventh Amendment immunity, Congress lacked the power to do so. *Humenansky*, 152 F.3d at 826. The Eighth Circuit held that only an *expansive* view of Congress' Section 5 enforcement powers could support the conclusion that Congress acted within its Section 5 powers in abrogating the States' Eleventh Amendment immunity from suit under the ADEA. This is because the ADEA was not tied to enforcing a judicially recognized equal protection violation; age is not a suspect or even a quasi-suspect class. *Humenansky*, 152 F.2d at 827. Moreover, the Eighth Circuit concluded that there was no legislative evidence of widespread age discrimination. *Id.* Therefore, the Eighth Circuit concluded that the extension of the ADEA to the States exceeded Congress' Section 5 powers. *Humenansky*, 152 F.3d at 828.

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[4] The Seventh Circuit opinion in *Wichmann* in this regard is consistent with decisions of the Second, Fifth, Sixth and Ninth Circuit Courts of Appeals. *Cooper v. N.Y. State Office of Mental Health, supra; Scott v. Univ. of Miss., supra; Cogar v. Bd. of Regents, supra; Keeton v. Univ. of Nev. Sys., supra.*

Similarly, in *Kimel*, Judge Cox issued a concurring opinion which concluded that Congress lacked the power to abrogate the States' Eleventh Amendment immunity from suit under the ADEA. *Kimel*, 139 F.3d at 1449 (J. Cox, concurring in part, dissenting in part). Judge Cox concluded that the ADEA conferred rights far more extensive than those provided by the Fourteenth Amendment. Because the elderly were not a suspect class, a rational relationship test would apply to any decisions based on age. But the ADEA was enacted to combat *all* age discrimination, whether or not there was a rational basis for the decision at issue. *Kimel*, 139 F.3d at 1446-1447. Judge Cox also concluded that there was no evidence that Congress' enactment of the ADEA was a proportional response to any widespread violation of the elderly's constitutional rights. *Kimel*, 139 F.3d at 1447.

SIU submits that the Eighth Circuit decision in *Humenansky* and the concurring Eleventh Circuit opinion in *Kimel* are consistent with this Court's decisions. In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), this Court addressed the limits of Congressional power under Section 5 of the Fourteenth Amendment. In *City of Boerne*, this Court concluded that the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000b *et seq.*, exceeded Congress' power under Section 5 of the Fourteenth Amendment. *City of Boerne*, 117 S. Ct. at 2171-72. In reaching that conclusion, the Court expressly confirmed the remedial, as opposed to substantive, nature of the enforcement clause of the Fourteenth Amendment. *Id.*, 117 S. Ct. at 2164. The Court observed that the design of

the Fourteenth Amendment was significant in maintaining the traditional separation of powers between Congress and the judiciary, as well as the balance of power between the federal and state governments. *Id.*, 117 S. Ct. at 2166, 2171-72. While noting that "preventive rules are sometimes appropriate remedial measures," the Court explained that "there must be a congruence between the means used and the ends to be achieved." *Id.*, 117 S. Ct. at 2169. The Court concluded that the broadly drawn RFRA was unconstitutional and exceeded Congress' powers under the Fourteenth Amendment because it contradicted the vital principles necessary to maintain the separation of powers between the Congress and the judiciary and the federal-state balance of power. *Id.*

Recently, in *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999), applying the *City of Boerne* analysis to the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act"), 35 U.S.C. § 271, *et seq.* (1988), this Court determined that the provisions of the Patent Remedy Act, were out of proportion to any remedial or preventive objective. *Florida Prepaid Postsecondary Education Expense Bd.*, 119 S. Ct. at 2210. The Court determined that the Act could not be understood to be responsive to unconstitutional behavior nor was there sufficient historical record to justify such a broad scope of coverage. *Id.* As a result, the Patent Remedy Act could not be sustained as a proper exercise of Congress' Section 5 powers. *Id.*

This Court has twice expressly left open the question of whether Congress had the power to apply the ADEA to the States under Section 5 of the Fourteenth Amendment. *Wyoming*, 460 U.S. at 243 & n.18; *Gregory*, 501 U.S.

at 468-70. However, the dissent in *Wyoming* (Chief Justice Burger, joined by Justices Powell, Rehnquist and O'Connor) reasoned that the ADEA was not *and could not* have been passed pursuant to the Fourteenth Amendment. *See Wyoming*, 460 U.S. at 263 (Burger, C.J., dissenting). The dissent in *Wyoming* concluded that the ADEA could be sustained as a proper exercise of power under the Fourteenth Amendment "only if we assume first, that Congress can define rights wholly independently of our case law, and second, that Congress has done so here." *Id.*, 460 U.S. at 262. The dissent noted that this Court had never determined that age discrimination was prohibited by the Equal Protection Clause. *Id.*, 460 U.S. at 260-61 & n.7.[5] In short, the dissent concluded that it could *not* be said that, in applying the ADEA to the States, Congress had acted to enforce equal protection guaranties as they had been defined by the Supreme Court. *Id.*, 460 U.S. at 261.

The dissent in *Wyoming* also rejected the argument that Congress had used its powers under the Fourteenth Amendment to enact legislation that prohibited conduct

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[5] This Court's earlier decisions which had rejected equal protection challenges to mandatory retirement plans under the rational basis test, *see Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (rejecting equal protection challenges to mandatory retirement for state police); *Vance v. Bradley*, 440 U.S. 93 (1979) (rejecting equal protection challenges to mandatory retirement for foreign service officers), had presented no occasion for the Court to determine the scope of the equal protection guaranty because the Court found the challenged legislation in those cases sustainable under the rational relationship test even if the Court assumed, *arguendo*, that classifications on the basis of age were protected by the Equal Protection Clause. *Wyoming*, 460 U.S. at 260-261 and n.7.

not in itself unconstitutional but which it considered necessary to guard against encroachment of guarantied rights or to rectify past discrimination. *Id.*, 460 U.S. at 261-62. The dissent reasoned that "allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." *Id.*, 460 U.S. at 262.

The dissent in *Wyoming* relied on *Oregon v. Mitchell*, 400 U.S. 112 (1970), wherein this Court held that Congress did not have the power under Section 5 of the Fourteenth Amendment to alter minimum age voting requirements in State and local elections. *Wyoming*, 460 U.S. at 263. In *Mitchell*, this Court had concluded that nothing in the Constitution and the relevant Amendments indicated that every classification based on age is outlawed, observing:

> The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

Mitchell, 400 U.S. at 127.[6] Moreover, as the dissent in *Wyoming* observed:

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[6] Indeed, in *City of Boerne*, this Court cited with approval *Mitchell's* holding that Congress had exceeded its enforcement powers by enacting legislation lowering the minimum age of voters from 21 to 18 in state and local elections because the legislation intruded into an area reserved by the Constitution to

> [T]here is much in the Constitution and the relevant amendments to indicate that States retain sovereign powers not expressly surrendered, and these surely include the power to choose the employees they feel are best able to serve and protect their citizens.

Wyoming, 460 U.S. at 263. Accordingly, the dissent in *Wyoming* concluded that "neither the Constitution nor any of its Amendments have transferred from the States to the Federal Government the essentially local function of establishing standards for choosing state employees." *Id.*, 460 U.S. at 264.

SIU submits that the Eighth Circuit's decision in *Humenansky* and the concurring opinion of the Eleventh Circuit in *Kimel* comport with this Court's decisions about the proper scope of Congress' power under Section 5 of the Fourteenth Amendment. The Seventh Circuit's contrary conclusion herein is erroneous. This Court should grant SIU's petition for a writ of certiorari to resolve the conflict between the Seventh, Second, Fifth, Sixth and Ninth Circuit Courts of Appeals decision in *Wichmann* and the Eighth Circuit.

CONCLUSION

For the foregoing reasons, Petitioner Board of Trustees of Southern Illinois University respectfully requests the Court to grant a writ of certiorari to review

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the States, and established the meaning of constitutional provisions contrary to the separation of powers between Congress and the courts. *City of Boerne*, 117 S. Ct. at 2170.

the decision of the Seventh Circuit Court of Appeals in *Wichmann* and consolidate the issues with *Kimel*. At a minimum, SIU respectfully requests this Court to hold its ruling on this petition pending the Court's decision in *Kimel* and to dispose of this petition consistent with this Court's decision in *Kimel*.

Respectfully submitted,

Board of Trustees of
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Theodore F. WICHMANN, Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY, Defendant-Appellant.

No. 97-2902.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 11, 1998.

Decided June 7, 1999*.

Appeal from the United States District Court for the Southern District of Illinois. No. 95 C 4134 – Philip M. Frazier, Magistrate Judge.

Before CUMMINGS, FLAUM and ROVNER, Circuit Judges.

PER CURIAM.

In August 1994, Theodore Wichmann, then 48 years old, was fired from his job at Southern Illinois University (the "University"), a state institution of higher education. Wichmann had been employed by the University for about 20 years and had been promoted to Associate Director of the University's Touch of Nature Environmental Center (the "Center") in 1985. His primary duties were the management of "experiential educational" programs, which involved taking various sorts of groups ranging from troubled youth to corporate executives to secluded areas for up to a month at a time. Wichmann would then

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* Judge Cummings participated in the consideration of this case but died before the decision was rendered.

conduct exercises meant to promote particular educational goals. Wichmann was apparently very good at his job. Every evaluation of his performance was glowingly positive. Two younger experiential educators whom he had mentored resigned at least partly because of his dismissal.

In the spring or summer of 1994, Wichmann's supervisor, Dr. Phillip Lindberg, decided to reduce the staff. Lindberg obtained the University President's approval for this decision. Lindberg fired Wichmann and Karen Hand, then age 35, Wichmann's subordinate in one of the programs for which Wichmann was responsible, the Wilderness Program, on August 15, 1994. He notified them that they each would be given a 12-month terminal contract and transferred to another University department. A terminal contract gives a dismissed employee a nonrenewable job for a specified period, here, one year. Such terminal contracts are common in academia, where hiring operates on an annual cycle rather than continuously. Lindberg is no longer with the University.

The University avers that Lindberg's sole reason for the firing was to resolve a budget deficit in the Wilderness Program. Wichmann's age was not a motivating factor in the decision, according to the University, as shown by the decision to fire the then 35-year-old Hand. Wichmann argues that he was fired solely because of his age and that the University's cost-cutting rationale was a pretext. The Center's accountant, Allen Bratten, testified that the accounting at the Center was unreliable. Apparent surpluses in Wichmann's programs, Bratten said, would be made to disappear by changing the accounting methods so that surplus funds would not have to be

repaid to another state agency. Wichmann argued, accordingly, that the Center's books were manipulated to provide a pretext for his termination. Lindberg himself admitted that accounting documents at the Center were sometimes misleading. Bratten bolstered Wichmann's pretext argument by testifying that Wichmann's termination in fact jeopardized the financial situation of the Center.

After the terminations, Lindberg approved a restructuring plan for the Wilderness Program. A meeting was held on September 13, 1994 to explain the restructuring to the staff. When Lindberg was asked at that meeting by Susan Campagno, a Center employee, why he had chosen to fire Wichmann, Lindberg replied: "Susan, think of it like this. In a forest you have to cut down the old, big trees so the little trees underneath can grow." This statement is undisputed, as is the fact that Lindberg knew that it was illegal to fire someone because of age. Lindberg admitted that the "little trees" were younger employees.

Several of these younger employees who had helped develop the restructuring plan benefitted from its implementation. Will Marble, then age 30, was given a promotion, a raise, and some of Wichmann's former duties; Tim Humes, then age 28, was promoted twice, once immediately after the firings; Joe Moore, then also under 40, was also given a promotion and raise. Some employees 40 or over were also given some of Wichmann's management responsibilities. The University says Wichmann's and Hand's positions were simply eliminated as part of the restructuring plan, their duties being in part assumed by other employees, some younger and some older than Wichmann, or in any case that the positions remained

unfilled. Wichmann argues that the restructuring involved in effect filling the position by redistributing its main duties to younger employees. Accountant Bratten testified that job descriptions at the Center were meaningless and had been manipulated for various purposes and that no positions had been eliminated in connection with Wichmann's discharge.

Wichmann had little chance of obtaining comparable work as an experiential educator, a rare speciality, in or near Southern Illinois or indeed elsewhere. While working in his terminal job, Wichmann pursued reinstatement. There was some dispute about whether he investigated a position in his new unit. Wichmann also testified that, while still at the University, he applied for 42 job positions and received no interviews. The University asserts that he applied for only two positions. This apparent factual discrepancy arises because the University's position is that the trial court improperly relied, in calculating damages, upon oral evidence of Wichmann's job search after it excluded written evidence as a discovery sanction. Wichmann is now self-employed on a winery he owns in Southern Illinois.

Wichmann sued the University in May 1995 under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.[1] The trial was bifurcated. In the

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[1] The statute in pertinent part makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The protected class is employees 40 years of age and over. *Id.* § 631.

liability phase, a jury found that the University had willfully violated the ADEA, firing Wichmann because of his age, though knowing that firing him for that reason was illegal. The remedy was tried by consent of the parties before Magistrate Judge Philip Frazier, exercising jurisdiction under 28 U.S.C. § 636(c)(1) and pursuant to Fed.R.Civ.P. 73. Wichmann was awarded back pay, liquidated damages, costs, and attorney's fees, and the University was ordered to reinstate him in his former job. The University appeals on the grounds that (1) Wichmann's lawsuit is barred by the Eleventh Amendment; (2) the evidence was legally insufficient to support the jury verdict; (3) the trial court improperly refused a proposed "business judgment" instruction to the jury; (4) Wichmann failed to mitigate his damages; and (5) it was an abuse of discretion to award Wichmann liquidated damages, which the University characterizes as "front pay." We affirm.

I. The Eleventh Amendment and the ADEA

The Eleventh Amendment denies a federal court jurisdiction in any suit "against one of the United States by Citizens of another State." U.S. Const., amend. XI. It has been construed to bar suits against a state by its own citizens without its consent or unless the immunity has been waived. *See Hans v. Louisiana*, 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890). The University, a state institution, here has not consented to be sued nor waived its immunity. However, Congress may abrogate a state's immunity if it has (1) " 'unequivocally expresse[d] its intent to abrogate . . . ' " and (2) "acted 'pursuant to a

valid exercise of power.' " *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (internal citations omitted). The University argues that in enacting the ADEA, Congress either did not in fact abrogate the states' sovereign immunity or lacked the constitutional power to do so under the Fourteenth Amendment. This Court has rejected these arguments previously, *see Goshtasby v. Bd. of Trustees of the Univ. of Ill.*, 141 F.3d 761, 766, 772 (7th Cir.1998); *Davidson v. Bd. of Govs. of State Colleges & Univers.*, 920 F.2d 441, 443 (7th Cir.1990); *EEOC v. Elrod*, 674 F.2d 601, 606 (7th Cir.1982), as have all but two Circuits that have considered the matter.[2] The University asks us to reconsider in view of *Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822 (8th Cir.1998), and *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir.1998), *cert. granted*, ___ U.S. ___, 119 S.Ct. 901, 142 L.Ed.2d 901 (1999). We reaffirm our previous view.

Wichmann's contention that the University has waived the Eleventh Amendment argument because it was not raised below in a timely way is without merit. State sovereign immunity " 'sufficiently partakes of the nature of a jurisdictional bar' that it may be raised by the

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[2] Accord *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700-701 (1st Cir.1983); *Santiago v. New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2d Cir.1991) (dictum); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir.1996); *Arritt v. Grisell*, 567 F.2d 1267, 1271 n. 11 (4th Cir.1977); *Scott v. Univ. of Mississippi*, 148 F.3d 493, 500 (5th Cir.1998); *Coger v. Bd. of Regents of Tennessee*, 154 F.3d 296, 307 (6th Cir.1998); *Keeton v. Univ. of Nevada System*, 150 F.3d 1055, 1057 (9th Cir.1998); *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1544 (10th Cir.1997).

State for the first time on appeal." *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 516 n. 19, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (internal citations omitted).

Congressional intent to abrogate Eleventh Amendment immunity must be "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985); *Seminole Tribe*, 517 U.S. at 55. As originally enacted in 1967, the ADEA did not mention the States or their subdivisions. In 1974 the statute was amended to expand the definition of "employer" to expressly include "a State or political subdivision of a state or any instrumentality of a State." Fair Labor Standards Act ("FLSA") Amendments of 1974, Pub.L. 93-259, Sec. 28, 88 Stat. 74 (amending 29 U.S.C. § 630(b)(2)). We have said that "[u]nless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases – and that degree of explicitness is not required . . . – it could not have made its desire to override the states' sovereign immunity clearer." *Davidson*, 920 F.2d at 443. The Supreme Court itself has repeatedly acknowledged that "there is no doubt what the intent of Congress was: to extend the application of the ADEA to the States." *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (dictum), accord *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 1954, 141 L.Ed.2d 215 (1998) ("[T]he ADEA plainly covered state employees . . . . ") (dictum).

The language we consider here is unmistakably clear because the amendment makes "a State" an employer and

the statute prohibits employers from engaging in age discrimination. *See* 29 U.S.C. § 623(a)(1). It follows as a matter of elementary logic that states are therefore prohibited from engaging in age discrimination. While a merely "permissible inference" of intent to abrogate is insufficient, *Dellmuth*, 491 U.S. at 232, the inference here is required because its denial would lead to a contradiction. The Supreme Court so reasoned in holding that the Americans with Disabilities Act clearly applied to inmates of state prisons, noting that, since the statute covers " 'public entities,' " State prisons "fall squarely within the statutory definition of 'public entity,' which includes 'any . . . instrumentality of a State. . . . ' " *Yeskey*, 118 U.S. at 1954-1955 (internal citations omitted) (a statutory interpretation case).

The Eleventh Circuit panel says that the Supreme Court rejected precisely this argument from logic stated above when it held that a 1966 amendment of the FLSA to include certain state agencies in the statutory definition of "employer" and allowing suits in courts of "competent jurisdiction" "did not provide the clear statement of intent to abrogate immunity." *Kimel*, 139 F.3d at 1431-1432 (citing *Employees of the Dep't of Public Health & Welfare v. Missouri*, 411 U.S. 279, 281, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973)). But Employees addresses the standard of clear intent for Congressional abrogation of state sovereign immunity under the Commerce Clause, *Employees*, 411 U.S. at 284-285, now a moot issue, *see Seminole Tribe*, 517 U.S. at 72 (no abrogation under Commerce Power). While Congress did enact the ADEA under the Commerce Power, *see Wyoming*, 460 U.S. at 243, the present case

concerns whether Congress also acted under the Fourteenth Amendment. The standards for a clear statement of intent to abrogate under the Fourteenth Amendment are not the same as those formerly required under the Commerce Clause. The Employees Court thought that unmistakably clear language in the statute was insufficient and that support from legislative history was also necessary. *See Employees*, 411 U.S. at 285 (There was "not a word in the history of the 1966 [FLSA] amendments to indicate a purpose of Congress [to abrogate state sovereign immunity]."). That is no longer good law. *See Dellmuth*, 491 U.S. 223, 230, 109 S.Ct. 2397, 105 L.Ed.2d 181 (disapproving of the use of legislative history in this context).[3]

The Eighth Circuit majority in *Humenansky* argues that Congress, when responding to Employees, changed the enforcement provision of the FLSA to permit actions "against any employer (including a public agency) in any Federal or State court," Pub.L. 93-259, Sec. 6, 88 Stat. 61 (codified at 29 U.S.C. § 216(b)), but did not similarly amend the enforcement provisions of the ADEA, which still only permitted enforcement "in any court of competent jurisdiction." 29 U.S.C. § 626(c)(1), although it amended the ADEA's definition of "employer" to include

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[3] The ADEA would satisfy the Commerce Power standard if it applied because we have both unmistakably clear language and support in the legislative history. The 1974 amendment was intended to "remove discriminatory barriers against employment of older workers . . . at the Federal and local government levels as it has . . . in private employment." S.Rep. No. 93-690, 93d Cong., 2d Sess., 55 (1974); H.R.Rep. No. 93-913, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 2811, 2850.

the states. The Eighth Circuit majority concludes that the ADEA therefore offers no "proper basis for finding 'unmistakably clear' intent. . . . " *Humenansky*, 152 F.3d at 825. But "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11, 62 S.Ct. 875, 86 L.Ed. 1229 (1942); *see also United States v. Wells*, 519 U.S. 482, 496, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) (Congressional silence "at best [a] treacherous" basis for imputation of legislative intent). We hold again that Congress unequivocally expressed its intent to abrogate.

We now turn to whether Congress acted pursuant to a valid exercise of power. Since the Supreme Court has ruled that Congress could not abrogate the Eleventh Amendment under the Commerce Clause, *Seminole Tribe*, 517 U.S. at 63, 72, the remaining issue is whether the ADEA represents a valid exercise of Congress' power under § 5 to enforce the provisions of the Fourteenth Amendment. We have held that it is because Equal Protection has long been held to require all state classification of persons to have at least a rational basis, treating similarly all similarly situated individuals. *See Goshtasby*, 141 F.3d at 771 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). Equal Protection is not limited to a closed short list of privileged classifications and the Supreme Court has subjected age classifications to rational basis review. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). The classifications considered there were held to meet that standard, but there would have been no point in applying

the standard if it made no difference whether the laws satisfied it. The ADEA amendment does not advert to § 5, but " 'the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.' " *Goshtasby*, 141 F.3d at 768 (quoting *Woods v. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 92 L.Ed. 596 (1948), and citing other cases).

The University's only argument here which deserves a second look is based on the theory that in applying the ADEA to the states, Congress went beyond its "remedial and preventative" power to enforce the Fourteenth Amendment, *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 2166, 138 L.Ed.2d 624 (1997) (invalidating Religious Freedom Restoration Act ("RFRA")), and attempted to exercise a "substantive, non-remedial" power it lacks. *Id.* at 2167. RFRA prohibited the states from enacting even generally applicable laws that substantially burdened the free exercise of religion unless these laws satisfied the most rigorous sort of judicial scrutiny. On this theory, the ADEA amendment, like RFRA, fails the requirements of "congruence and proportionality between the injury to be prevented and the means adopted . . . ," *id.* at 2164, which is necessary for remedial action.

We have said that proportionality is a matter of the " 'extent of the threatened constitutional violations and the scope of the steps provided in the legislation to remedy or prevent such violations.' " *Goshtasby*, 141 F.3d at 771 (citing *Coolbaugh v. Louisiana*, 136 F.3d 430, 435 (5th Cir.1998)). The proportionality test requires that the more intrusive upon state powers and prerogatives is the Congressional enactment, and the more universal or general

the enactment is in its intrusiveness, the greater is the burden upon Congress to articulate, through findings or otherwise, the extent of the evils the statute is meant to remedy and prevent. An enactment which is less intrusive into state powers or less universal in scope, like the Voting Rights Act of 1965, *see City of Boerne*, 117 S.Ct. at 2169-2170, will require less by way of findings which reveal such violations than one which, like RFRA, is more intrusive and universal in scope. *City of Boerne*, however, does not require that Congress supply appropriate findings whenever it seeks to act under § 5. *See id.* at 2170 ("Judicial deference, in most cases, is based not on the state of the legislative record, but 'on due regard for the decision of the body constitutionally appointed to decide.' ").

The first part of our inquiry concerns intrusiveness. If the Voting Rights Act and RFRA are at the extremes on the continuum of intrusiveness considered here, the ADEA is in the middle. Regulation of the terms and conditions of public employment may be an important power or prerogative of the states, but it is not more important than regulation of voting and elections. Like the Voting Rights Act, the scope of which is confined to state voting laws, and unlike RFRA, which "displac[ed] laws and prohibit[ed] official actions of almost every description and regardless of subject matter," *City of Boerne*, 117 S.Ct. at 2170, the ADEA is limited to a "discrete class" of state laws and actions, *id.*, viz., those concerning age criteria for public employment. The ADEA, unlike RFRA, is prohibitory, imposing no affirmative obligations on the states. The burden the ADEA places upon them, unlike RFRA or the Voting Rights Act,

does not require "searching judicial scrutiny," *id.* at 2171, but is more like a rationality test in forbidding discrimination on the arbitrary grounds of age. Like RFRA and unlike the Voting Rights Act, the temporal and spatial reach of the ADEA is unbounded, but "§ 5 legislation [does not] require [ ] termination dates, geographic restrictions, or egregious predicates." *Id.* at 2170. The ADEA, then, is not particularly intrusive.

The second part of the inquiry concerns proportionality of the response to the evils to be remedied. With RFRA, the "legislative record lack[ed] examples of any [modern] instances of . . . laws passed because of religious bigotry." *City of Boerne*, 117 S.Ct. at 2169. The situation was otherwise with the Voting Rights Act. With the ADEA, Congress embodied factual findings in the statute, saying, among other things, that "older workers find themselves disadvantaged in their efforts to retain employment" because "the setting of arbitrary age limits regardless of the potential for job performance has become a common practice. . . . " 29 U.S.C. § 621(a) (quoted in *Goshtasby*, 141 F.3d at 771) (also discussing legislative history); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-611, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); *Wyoming*, 460 U.S. at 230-232 (acknowledging these findings). The constitutional basis of the Act as applied to the states is, as explained *supra* p. 9, the right under Equal Protection not to be subject to arbitrary state classification without any rational basis. It is fairly determinable that Congress has properly concluded that application of the ADEA to public employment is necessary to remedy or deter constitutional violations of an extent great enough

to make this legislative response proportional and congruent in view of its relative lack of intrusiveness. We therefore reaffirm our prior holdings that Congress clearly abrogated the states' sovereign immunity under a valid exercise of its § 5 enforcement powers.

II. Sufficiency of the Evidence

A. Standards

The University argues that Wichmann failed to carry his burden of proof of age discrimination, so that the district court erred in denying the University's motion for judgment as a matter of law, a determination we review de novo. *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1129 (7th Cir.1997). We view the evidence in the light most favorable to the nonmoving party and ascertain whether there exists any evidence upon which a jury could reach that verdict. *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343-344 (7th Cir.1995) (internal citations omitted). A mere scintilla is not enough. *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir.1984). However, we will overturn a jury verdict for the plaintiff only if we conclude that "no rational jury could have found for the plaintiff." *Collins v. Kibort*, 143 F.3d 331, 335 (7th Cir.1998) (internal citations omitted). We apply this standard "stringently" in discrimination cases, where witness credibility is often crucial. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 948 (7th Cir.1998). Once the plaintiff prevails before the jury, the method of proof at trial is irrelevant. We simply ask

whether the jury's verdict for Wichmann could be sustained on the whole record. *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 545 (7th Cir.1997); *Collins*, 143 F.3d at 335 (citing cases). Here, it can be sustained.

B. Direct Evidence

The most striking piece of evidence in the case is Lindberg's remark to one of Wichmann's subordinates at the Center during a meeting held within a month of the firings. In direct response to an inquiry as to why Wichmann had been fired, Lindberg stated, "Think of it like this. In a forest you have to cut down the old, big trees so the little trees underneath can grow." We have held that "an employer statement that reveals hostility to older workers" may constitute direct evidence of discrimination, but have noted that such remarks are "rarely found." *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1420 (7th Cir.1992). This case presents such a remark, *but see Bikbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir.1994) (In overturning a jury verdict, the court held that statement: "There comes a time when we all have to make way for younger people," did not create an inference of age discrimination because it was a truism with no disparaging overtones.). Whether or not we would go as far as the Fourth Circuit, we think that a rational jury might have accepted the University's innocuous explanation, that the "old trees" remark was made to reassure the troubled employees about the reorganization. But a rational jury could also infer illegal motivation from Lindberg's statement in the context in which it was made.

Lindberg did not expressly say, "Wichmann was fired because he was too old," but a rational jury could have understood his statement to mean just that. The fact that the "old trees" remark was metaphorical does not make it too ambiguous to qualify as direct evidence. Language may be all the more unmistakable and vivid for being metaphorical, figurative, or nonliteral. *See Federal Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir.1997) (acknowledging that "[m]etaphorical and figurative speech can be more pointed and compelling," than "banal, literal language [which] often carries less force.") (election law case); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir.1987) (Establishment Clause context); cf. also *Cohen v. California*, 403 U.S. 15, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (noting emotive significance of nonliteral expression). Not just any metaphorical language will be direct evidence of discrimination. Whether it is in a particular case will typically be a question of fact.

Direct evidence is "evidence which can be interpreted as an acknowledgment of the defendant's discriminatory intent. . . . ," *Kormoczy v. HUD*, 53 F.3d 821, 824 (7th Cir.1995) (emphasis added); that is, to constitute direct evidence of discrimination, "a statement must relate to the motivation of the decisionmaker responsible for the contested decision." *Rothman v. Emory Univ.*, 123 F.3d 446, 451 (7th Cir.1997) (internal citations omitted). As an age-related explanation of the firing, Lindberg's statement about cutting down the old trees could certainly be interpreted as a "remark [or] other evidence that reflect[s] a propensity by the decisionmaker to evaluate employees based on illegal criteria" which, we have said, " 'will

suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality.' " *Miller v. Borden, Inc.*, 168 F.3d 308, 312 (7th Cir.1999) (quoting *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir.1997)). *See also Sheehan v. Donlen Corp.*, Nos. 98-1020, 98-1095, 1999 WL 179015 at *4 (7th Cir. Mar. 18, 1999) ("It would cripple enforcement of the employment discrimination laws to insist that direct evidence take the form of an employer's statement to the effect that 'I'm firing you because you're in a protected group.' ").

The fact that Lindberg's "old trees" remark is a single "isolated comment" does not disqualify it as direct evidence of discrimination. For "isolated comments" to rise to the level of such evidence, they "must be contemporaneous with the discharge or causally related to the discharge decision making process." *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 723 (7th Cir.1998) (internal citations omitted). In that case, a comment disapproving of mothers working made in a casual setting five months before the firing and unrelated to discussions of the inadequate job performance which led to plaintiff's dismissal was not direct evidence of pregnancy discrimination. *Id.* at 724. But Lindberg's "old trees" remark was made within a month of the firing, in a context where the firing was being discussed, and was offered as an explanation of that action. It was therefore both contemporaneous and causally related. Before "seemingly stray workplace remarks will qualify as direct evidence of discrimination, the plaintiff must show that the remarks 'were related to the employment decision in question.' " *Fuka v. Thomson Consumer Electronics*, 82 F.3d 1397, 1403 (7th Cir.1996) (internal citations omitted) (citing *Price*

Waterhouse v. Hopkins, 490 U.S. 228, 251, 277, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion and opinion of O'Connor, J., concurring)). Even if Lindberg's was a "stray remark," Wichmann has shown that it was closely enough related to the decision to fire him.

The University makes a great deal of the fact that Wichmann's subordinate Hand, then age 35, was also fired. The "old trees," says the University, were Wichmann and Hand, who was not in the 40-and-over age group protected by the ADEA. The University asks us to hold that no rational jury could have concluded that Wichmann, who was protected, was fired because of illegal motivations because Hand, who was not protected, was also fired. The jury, however, might rationally have rejected this non sequitur. Wichmann and Hand might both have been fired because of age, although only Wichmann would have a cause of action under the ADEA. An employer cannot avoid liability for firing someone 40 or over because of age by also firing someone under 40 because of age. Under these circumstances, that raises no inference of a legitimate nondiscriminatory motive.

C. Circumstantial Evidence

Wichmann also introduced circumstantial evidence that he was fired because of age which tended to support that conclusion if viewed with the totality of evidence. Younger workers were "treated more favorably than" Wichmann, which is the appropriate standard whether we regard Wichmann's termination as a Reduction in Force, *see Collier v. Budd Co.*, 66 F.3d 866, 891 (7th Cir.1995), or as a case "where one employee is discharged

and his responsibilities are absorbed by other employees, which essentially makes the single discharge a mini-RIF." *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1332 (7th Cir.1995). The younger employees were retained, absorbed Wichmann's day-to-day duties, and received pay increases.

Taken by themselves, these facts would constitute only a thin case for intentional discrimination, particularly since Wichmann made little showing that the younger employees were similarly situated. *See Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994). Thus, while some inference of discrimination may flow from the retention and promotion of younger employees alone, in a single discharge case or mini-RIF, "where fungibility among jobs is not demonstrated, . . . the inference of discrimination is necessarily much weaker." *Gadsby*, 71 F.3d at 1331-1332. Nonetheless, these facts do provide some support for such an inference.

We have said that even a thin case may stand on our deferential review of a jury's verdict, *see Price v. Marshall Erdman & Assoc.*, 966 F.2d 320, 322 (7th Cir.1992), but the circumstantial evidence does not stand alone. It looks decidedly stronger in view of Lindberg's explanation of Wichmann's termination ("In a forest you have to cut down the old, big trees so the little trees underneath can grow."). A rational jury might have accepted an innocent explanation of these facts, but it might also have concluded that they showed that Lindberg's remark meant that Lindberg indeed fired Wichmann because of his age.

D. Rejection of the Defendant's Reasons

The University attempted to explain its decision on other grounds, but the jury rejected the University's gloss on the evidence. The factfinder's rejection of the defendant's nondiscriminatory explanation of the facts comprising a prima facie case may itself be enough to find for the plaintiff on the issue of liability. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Here, construing the evidence in the light most favorable to Wichmann, as we must, *see Deimer*, 58 F.3d at 343, we conclude that a rational jury might well have found the University's story incredible. A rational jury might indeed have accepted the University's version, but it was not irrational of this jury to reject it, and that by itself could justify the verdict for Wichmann.

According to the University's story, the Wilderness Program Wichmann supervised was being eliminated and his position abolished to eliminate a deficit. The program, however, was not eliminated, although Wichmann and the Center accountant, Bratten, were told that it was to be cut. The University also said both that Wichmann's Associate Director position was eliminated and that it remained unfilled, with there being no immediate plans to fill it. These statements are hard to reconcile. The responsibilities of Wichmann's position were in any case redistributed in substantial part to younger employees.

There was unrebutted evidence that job descriptions at the Center were meaningless, so it does not help the University that no one was given Wichmann's title. In

any event, an employer cannot avoid liability for intentional discrimination by the "simple expedient" of changing job titles. *Riordan v. Kempiners*, 831 F.2d 690, 699 (7th Cir.1987) (Equal Pay Act context); *Soto v. Adams Elevator Equipment*, 941 F.2d 543, 548 (7th Cir.1991) (Under the Equal Pay Act, "[a]ctual job performance and content, not job titles, are key."); accord *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 743 (7th Cir.1999) (Title VII). Nor, even had the jury accepted that the position had been eliminated, would such an elimination by itself insulate an employer from liability for age discrimination. *See e.g., Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 96 (7th Cir.1985). In part for this reason we need not address whether Wichmann's firing was a Reduction in Force, involving elimination rather than replacement of a position.

The jury could rationally have believed that the deficit in the Wilderness Program, the supposed reason for the firing, was merely a pretext for the illegal termination. Bratten explained that accounting at the Center was manipulated, with surpluses being "disappeared" when necessary to deceive the state government about monies the Center would have otherwise had to repay. Lindberg himself admitted that the Center's accounting was sometimes misleading. Bratten, the Center accountant, was not consulted about the purported deficit. He said that Wichmann's firing made the financial situation of the Center worse. The University is of course entitled to make business decisions, even bad ones, "and it is not for this court to second-guess those decisions. But . . . the less sensible an employer's decision appears to be, the more likely it is that the jury will not credit it." *Artis v. Hitachi Zosen*

Clearing, Inc., 967 F.2d 1132, 1140 (7th Cir.1992). The evidence would have reasonably supported the "suspicion of mendacity" which can by itself sustain a finding of intentional discrimination. *Hicks*, 509 U.S. at 511.

E. Willfulness

The University argues that even if Lindberg did fire Wichmann because of his age, no rational jury could have found that Lindberg did so willfully. For willfulness, it must be the case that the employer "did not 'act [ ] reasonably and in good faith in attempting to determine whether [its action] would violate the ADEA,' " *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1457 (7th Cir.1992), and that, therefore, the employer " 'knew or showed reckless disregard' " for whether its conduct was prohibited by the ADEA. *Id.* (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126, 128-129, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985)). We have rejected the view that the employer's "action is not willful unless he knew or was reckless about whether that specific action violated the ADEA." *Id.* at 1465 (Manion, J., dissenting). The term "willful," we have said, "as used in the ADEA[, is] designed to shield the employer who violates the Act without knowing it," *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (7th Cir.1990) (citing *Thurston*, 469 U.S. 111, 128-129, 105 S.Ct. 613, 83 L.Ed.2d 523; *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133-135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988)), and whose ignorance is not reckless. Such cases may be rare, since at this point almost any employer will know that age discrimination is illegal, but they do occur. *See, e.g., Heiar v. Crawford County, Wisconsin*, 746 F.2d

1190, 1197-1199 (7th Cir.1984) (illegal imposition of mandatory retirement age not willful when employer wrongly believed this was permitted by provision allowing age discrimination if "reasonably necessary" for one's business).

A finding of willfulness is appropriate, however, where a jury could reasonably have found that the violation was "deliberate and indeed bare-faced." *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 749 (7th Cir.1994). The jury could have so found here, although the conclusion was not required. Lindberg knew that it was illegal to fire someone because of his age. We have held that "[n]o inference of guilt can be drawn from [mere] awareness of one's legal obligations," *Partington v. Broyhill Furniture Indus., Inc.*, 999 F.2d 269, 271 (7th Cir.1993), because we do not wish to discourage employers from informing themselves of those obligations. But "innocuous evidence of age awareness" becomes significant when combined with other evidence of discrimination. *Id.* at 271-272.

Given the "old trees" remark together with the more favorable treatment of younger employees, as well as the disbelieved story about the deficit and the elimination of Wichmann's position, this evidence "does permit a reasonable inference of willful discrimination." *Futrell v. J.I. Case*, 38 F.3d 342, 349 (7th Cir.1994). In *Futrell*, the evidence included termination after years of favorable performance reviews, replacement by someone younger, and preparation for an age discrimination lawsuit, which "[t]aking the facts as a whole," allowed a reasonable inference of willfulness. *Id.* at 350. The last sort of evidence is not present here, but here we have the "old

trees" remark lacking there. We therefore decline to overturn the jury's finding that the University willfully violated the ADEA by terminating Wichmann because of his age, knowing that this was illegal.

III. Jury Instructions

The University requests a new trial on the grounds that it was prejudiced by the trial court's refusal to give the jury what it calls a "business judgment instruction." We construe jury instructions only to determine if "the instructions as a whole were sufficient to inform the jury correctly of the applicable law." *Patel v. Gayes*, 984 F.2d 214, 218-219 (7th Cir.1993). Reversal is warranted only if the mistaken or incomplete instruction "misguides the jury so much that a litigant is prejudiced." *Doe v. Burnham*, 6 F.3d 476, 479 (7th Cir.1993). First, then, we must determine whether the instruction misstates or insufficiently states the law. If so, second, we determine whether error "confused or misled the jury[,] causing prejudice to a litigant." *Id.*

The jury instructions given were accurate – to find liability only if "Plaintiff's age was a substantial motivating factor in the decision to terminate his employment, that is, but for Plaintiff's age, his employment would not have been terminated." But according to the University, the jury might have been improperly swayed by the facts that Wichmann was a sympathetic plaintiff, capable, hardworking, popular, and that his firing could have seemed unwise or unfair. The ADEA, the University argues, does not prohibit incompetence, stupidity or general injustice by employers, but only age discrimination.

See Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1399 (7th Cir.1997). The University contends that for these reasons the trial court stated the law insufficiently to the point of misleadingness. Our civil justice system, however, is based on the idea that "the jury is well-equipped to evaluate the evidence and use its good 'common sense' to come to a reasoned decision." Sheehan, 173 F.3d 1039, 1999 WL 179015 at *6. A judge "need not deliver instructions describing all valid legal principles. . . . " *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir.1995). Generally speaking, "the judge may and usually should leave the subject to the argument of counsel." *Id.*

All parties are entitled to jury instructions which are accurate and complete. But trial courts need not take any extraordinary measures in instructing the jury to protect employers who make foolish or inequitable decisions about sympathetic employees. In employment discrimination law, as in tort law, one takes one's plaintiffs as one finds them, sympathetic or not. Moreover, a defendant cannot escape the fact that a jury must use its good common sense in addressing how much, if at all, the foolishness or unfairness of the employer's decision weighs in the evidence of pretext. Since the challenged jury instruction involved no misstatement or insufficient statement of the law, we need not consider whether the University was prejudiced by any error.

IV. Damages

A. Mitigation

The University argues, first, that Wichmann failed to mitigate his damages by neglecting to seek a comparable

job with reasonable diligence, and so the University was entitled to a reduction or elimination of the damages awarded him. This is an affirmative defense. The magistrate judge who tried the damages portion of this bifurcated action ruled that the University did not carry its burden of proof. A trial court ruling on mitigation is normally sustained unless clearly erroneous, *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 818 (7th Cir.1990), but the University's failure-to-mitigate defense turns mainly upon a challenge to the admission of certain evidence, which is to be appraised under the more deferential standard of abuse of discretion. *Taylor v. National Railroad Passenger Corp.*, 920 F.2d 1372, 1375 (7th Cir.1991).

The University objects that the trial court, in ruling on this defense, considered evidence of 42 jobs to which Wichmann had unsuccessfully applied which had been the subject of discovery sanctions. Wichmann did, in fact, send 42 job letters to various potential employers seeking employment, but failed to disclose the existence of the letters prior to trial. The trial court excluded these letters from evidence at trial, but allowed Wichmann to testify orally that he had made the applications. The University argues that in view of the trial court's exclusion of the letters at trial, it was error to admit the testimony about the applications in its mitigation hearing.

This argument is incorrect. The trial court did not exclude all evidence of the applications, but only the letters. The letters were not offered in evidence to satisfy some requirement of a writing but to show that Wichmann made certain job applications. Even if the letters were entirely excluded from consideration, the trial court could properly consider Wichmann's oral testimony

about his applications. "Proportion to the harm is an essential part of sanctions practice." *Smith v. Chicago School Reform Bd. of Trustees*, 165 F.3d 1142, 1147 (7th Cir.1999). The exclusion of the letters from trial was proportionate to Wichmann's failure to disclose them in pretrial proceedings. But if the oral testimony about the jobs was considered by the trial court in the mitigation hearing, that was not abuse of discretion.

The University's other arguments concerning mitigation fail to establish clear error in the determination by the court below that Wichmann had made reasonable efforts to mitigate his damages. In view of testimony about Wichmann's 42 applications and other evidence presented, the University's arguments support no "definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948) (explaining meaning of clearly erroneous standard of review).

B. Liquidated Damages and "Front Pay"

The University argues that "front pay" is " 'less appropriate where liquidated damages are awarded.' " (quoting *McNeil v. Economics Lab., Inc.*, 800 F.2d 111, 118 (7th Cir.1986)) (overruled on other grounds by *Coston v. Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir.1988)), and asks us to remit this portion of the damages award. But there was no front pay award. In denying Wichmann's request for front pay, the trial court explained that front pay is an equitable alternative to the reinstatement ordered here instead. *See, e.g., Price*, 966 F.2d at 322. The liquidated damages award is a legal rather than an equitable remedy

and was properly awarded because of the finding that the University's violation of the ADEA was willful. *See* 29 U.S.C. § 626(b). The University's characterization and appeal of that court's liquidated damages award are at the very least somewhat careless.

The judgment of the court below is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THEODORE F. WICHMANN,	)	
Plaintiff,	)	**CIVIL NO. 95-4134-PMF**
vs.	)	**(Filed Jul. 1, 1997)**
BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,	)	
Defendant.	)	

AMENDED JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. Additionally, damages issues have been heard by the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff Theodore F. Wichmann, and against Defendant Board of Trustees of Southern Illinois University, in the amount of $93,202.02 for back pay plus a sum of money calculated by multiplying $151.31 by the number of days from April 14, 1997, to the date of reinstatement, and $93,202.02 for liquidated damages plus a sum of money calculated by multiplying $151.31 by the number of days from April 14, 1997, to the date of reinstatement.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff be reinstated to his former position as Associate Director of the Touch of Nature Environmental Center by August 15, 1997.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall recover attorneys' fees in the amount of $36,312.00 and litigation expenses in the amount of $1,960.25.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Phillip A. Lindberg's Motion to Dismiss Count II of the Complaint is granted, and judgment is entered in favor of Defendant Phillip A. Lindberg and against Plaintiff Theodore F. Wichmann.

IT IS FURTHER ORDERED AND ADJUDGED that costs are taxed in plaintiff's favor in the amount of $2,393.20.

IT IS FURTHER ORDERED AND ADJUDGED that the Order of Reinstatement will not be stayed during the pendency of appeal. The stay of enforcement pending appeal is granted as to money damages. No bond is required of defendant.

DATED: June 30, 1997

NORBERT G. JAWORSKI, CLERK

/s/ Karen R. Metheney
By: Karen R. Metheney
Deputy Clerk

EOD: 7-2-97

APPROVED:

/s/ Philip M. Frazier
HON. PHILIP M. FRAZIER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THEODORE F. WICHMANN,	)	
Plaintiff,	)	**CIVIL NO. CV 95-4134-PMF**
vs.	)	**(Filed Jun. 27, 1997)**
BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,	)	
Defendant.	)	

MEMORANDUM AND ORDER

FRAZIER, Magistrate Judge:

Before the Court are several motions submitted by plaintiff and defendant. They will be dealt with in the order they appear in the file.

First is plaintiff's "Motion to Amend Judgment" (Doc. No. 87).

Plaintiff correctly points out that the judgment inadvertently omitted the 36 days between April 14 (the date of trial) and May 23, 1997 (the date of judgment). Plaintiff is also correct in his argument that he should receive additional liquidated damages. Defendant was ordered to pay to plaintiff $151.31 per day from the date of final judgment until his reinstatement. Presumably, plaintiff's reinstatement will occur in or before August, 1997. The purpose of back pay is to make plaintiff whole. Had plaintiff not been terminated, he would have received a continuous salary. Because payment of the per diem until reinstatement constitutes back pay, plaintiff is entitled to

double that amount as liquidated damages. The Amended Judgment should note that defendant is ORDERED to pay to plaintiff in addition to the back pay and liquidated damages set forth a sum money calculated by multiplying $151.31 by the number of days from April 14, 1997, to the date of reinstatement. That figure should then be added to the sum of $93,202.02 to determine total back pay. Plaintiff will be entitled to a like sum as liquidated damages.

Plaintiff's concern that additional attorneys' fees will be generated before this matter is laid to rest is understandable. Entry of final judgment "shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees. . . . " Fed. R. Civ. P. 58. The type of judgment plaintiff requests seems to be barred by Rule 58. In any event, plaintiff will have another opportunity to seek additional fees and costs if successful on appeal. If no appeal is taken, then plaintiff may reapply to this Court.

Next is plaintiff's "Motion for Assessment of Costs" (Doc. No. 89). Federal Rule of Civil Procedure 54(d) authorizes district courts to award costs to prevailing parties in accordance with specific statutory authorizations. *Barber v. Ruth*, 7 F.3d 636, 644 (7th Cir. 1993). 28 U.S.C. § 1920 defines which costs are recoverable. A district court may decline to award costs listed in the statute but may not award costs which are not specifically authorized. *Barber v. Ruth*, 7 F.3d at 644.

The following costs will be allowed:

(1)	The May 17, 1995, filing fee	$120.00
(2)	Transcript of defendant's deposition	$111.00

(3)	Transcript of deposition of Philip Lindberg	$263.00
(4)	Transcript of Mark Cosgrove deposition	$ 85.00
(5)	Copies of exhibits	$ 18.00
(6)	Grossman's videotape deposition	$180.00
(7)	Transcript of depositions of John Guyon and Al Bratten	$177.00
	Total	$954.00

The following claimed costs are nontaxable:

(1)	Transcript of videotape deposition of Dr. John Guyon	$118.50
(2)	Mudge legal video – videotape of deposition of Dr. John Guyon	$295.00
(3)	U.S. District Court	$ 3.00
(4)	Transcript and tape of Grossman's deposition	$163.12
	Total	$579.62

Pursuant to Fed. R. Civ. P. 30(b)(4), parties may stipulate to record a deposition by other than stenographic means; i.e., videotape. The videotape is then substituted for a stenographic transcript. A party may not claim as costs both the stenographic transcript and videotape expenses. *Barber v. Ruth*, 7 F.3d 636, 645 (7th Cir. 1993). There has been no showing that Guyon's videotape deposition was reasonably necessary to prosecute this matter. Those costs will not be allowed. Grossman's video deposition was used at trial, and plaintiff was credited for it. Payment is not allowed for the transcript also.

The $3.00 attributable to the United States District Court is unsubstantiated. For that reason, it was disallowed.

The following costs are taxable concerning witness Will Marble:

(1)	Travel time and attendance fee	$120.00
(2)	Plane fare	$370.00
(3)	BART	$ 80.00
(4)	Personal vehicle travel to and from the El Paso, Texas, airport, calculated at 31 cents per mile for 560 miles	$173.60
(5)	Airport parking	$ 10.60
(6)	Subsistence allowance for three days[1]	$171.00
	Total	$925.20

Susan Compagno will be allowed the following witness fees and costs:

(1)	Attendance fee	$120.00
(2)	Plane fare	$241.00
(3)	Shuttle bus to San Francisco, California, airport	$ 30.00

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[1] 28 U.S.C. § 1821(d)(2) allows subsistence for a witness in an amount not to exceed the maximum per diem allowance prescribed for official travel in the area of attendance by employees of the federal government. That per diem in this district is $80.00 with lodging and $57.00 without. Mr. Marble will be allowed the $57.00 because he did not submit a lodging receipt. It is possible that he stayed with friends.

(4)	Parking		$ 9.00
(5)	Per diem subsistence[2]		$114.00
		Total	$514.00

The following claimed costs will not be taxed in favor of Susan Compagno:

(1)	Personal vehicle travel from Cobden, Illinois, to Benton, Illinois, on April 14 and 15, 1997	$ 62.00

Ms. Compagno traveled to St. Louis, Missouri, in an airplane. Reimbursement for personal vehicle travel appears to require that one's own vehicle be used. There is no reason to believe that Ms. Compagno used her own vehicle while in Southern Illinois. For that reason, the claimed expense will not be allowed.

The total costs and expenses which will be taxable in favor of plaintiff are $2,393.20.

Next is "Defendant's Renewed Motion for Judgment as Matter of Law or, in the Alternative, for a New Trial" (Doc. No. 90). The motion is DENIED. The jury had evidence before it to reach its verdict. Obviously, plaintiff fell within the protected group. His job performance was, by all accounts, well above average. The reduction in force reason offered by defendant was made suspect by the testimony of accountant Al Bratten. The testimony of former SIU President, Dr. John Guyon, further undermined the reduction in force position. Finally, the "Old

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[2] See Footnote 1.

Tree" metaphore could very easily have been viewed by jurors as a smoking gun.

The Court's rulings on the excluded letters from plaintiff's attorney and SIU's proposed instructions are set forth in the record. They will not be rehashed here.

Defendant's mitigation argument lacks merit. First of all, it was defendant's job to prove that plaintiff did not mitigate his damages, something which defendant did not do. Plaintiff offered several instances of attempts to find work. The fact that plaintiff's 42 job applications were mentioned in the order setting damages is of no moment. First of all, defendant did not object to plaintiff's testimony that he made 42 job applications without receiving an interview. The discovery sanction prohibited plaintiff from introducing the list into evidence. After the ruling was made, no further reference was made to the list. As far as the Court knows, the job applications he referred to – many of which were elicited during questioning by defense counsel – were not on the list. Once again, it was defendant's job to prove that plaintiff had failed to mitigate damages, something defendant did not do.

The Order of Reinstatement will not be RECONSIDERED.

One thing which will be reconsidered is the award of $1,400.00 for Dr. Grossman's expert fee. Defendant has correctly pointed out that such a fee is nontaxable. The award will be REDUCED to $40.00, and the Amended Judgment should reflect a decrease of $1,360.00.

The final motion is "Defendant's Motion for a Stay Pending the Court's Ruling on its Post-Trial Motions and for a Stay Pending Apepal" (Doc. No. 92). The post-trial motions have now been ruled on, and the first part of the request is MOOT. The Order of Reinstatement will not be STAYED during the pendency of appeal. Obviously, plaintiff has a great interest in returning to his employment. There is no reason to deprive him of that for the several months which it might take this matter to work its way through the appeals process.

The stay of enforcement pending appeal is GRANTED concerning money damages. No bond will be required of defendant.

RECAPITULATION

Plaintiff's "Motion to Amend Judgment" (Doc. No. 87) is GRANTED. Defendant is ORDERED to pay to plaintiff as back pay $93,202.00 plus a sum of money calculated by multiplying $151.30 by the number of days from April 14, 1997, to the date of reinstatement. Defendant is FURTHER ORDERED to pay as liquidated damages a sum of money equal to the total back pay as calculated above.

Plaintiff's "Motion for Assessment of Costs" (Doc. No. 89) is GRANTED. Total costs which will be taxed in plaintiff's favor are $2,393.20.

Defendant's "Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial" (Doc. No. 90) is DENIED.

Defendant's "Request to Reconsider the Award of $1,400.00 for Dr. Grossman's Expert Fee" is GRANTED. The award is REDUCED to $40.00, and the Amended Judgment should reflect a total decrease of $1,360.00.

Defendant's "Motion for Stay Pending the Court's Ruling on its Post-Trial Motions and for a Stay Pending Appeal" (Doc. No. 92) is GRANTED in part and DENIED in part. The Order of Reinstatement will not be stayed during the pendency of appeal. The stay of enforcement pending appeal is GRANTED concerning money damages. No bond is REQUIRED of defendant.

IT IS SO ORDERED.

DATED: June 27, A.D. 1997.

/s/ Philip M. Frazier
PHILIP M. FRAZIER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THEODORE F. WICHMANN,	)	
Plaintiff,	)	**CIVIL NO. 95-4134-PMF**
vs.	)	
BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,	)	
Defendant.	)	

JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. Additionally, damages issues have been heard by the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff Theodore F. Wichmann, and against Defendant Board of Trustees of Southern Illinois University, in the amount of $93,202.02 for back pay and $93,202.02 for liquidated damages.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff be reinstated to his former position as Associate Director of the Touch of Nature Environmental Center by August 15, 1997.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall recover attorneys' fees in the amount of $36,312.00 and litigation expenses in the amount of $3,320.25.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Phillip A. Lindberg's Motion to Dismiss Count II of the Complaint is granted, and judgment is entered in favor of Defendant Phillip A. Lindberg and against Plaintiff Theodore F. Wichmann.

DATED: May 23, 1997

NORBERT G. JAWORSKI, CLERK

/s/ Karen R. Metheney
By: Karen R. Metheny
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THEODORE F. WICHMANN,	)	
Plaintiff,	)	**NO. CV 95-4134-PMF**
VS.	)	
BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,	)	**(Filed May 23, 1997)**
Defendant.	)	

MEMORANDUM AND ORDER

FRAZIER, Magistrate Judge:

The liability aspects of this ADEA claim were tried before a jury on April 14, 15, and 16, 1997. The jury found in favor of plaintiff on his claim that his contract with Southern Illinois University was terminated because of his age. Following receipt of that verdict, the same jury was instructed on the issue of willfulness. Those deliberations produced another verdict for plaintiff. The parties stipulated before trial to submit all damage issues to the Court. Those matters were heard on April 17, 1997. Resolution of those issues follows.

I. Background.

Plaintiff, Ted Wichmann, was informed on August 15, 1994, that his contract with Southern Illinois University would not be renewed. He had been employed by SIU at Touch of Nature where he was the associate director. His

primary responsibility was to head the Wilderness Program. That program, founded by plaintiff, relied on his skills as an experiential educator to carry out the program's mission. Touch of Nature is part of the Recreation Department at SIU. Pursuant to SIU policy, plaintiff was reassigned to a teaching position in the Recreation Department for the twelve month period following his notification of nonrenewal. He received his regular salary but not a cost of living adjustment.

Experiential education is a distinct field. Groups ranging in diversity from troubled youths to corporate executives are taken to secluded areas for periods up to 30 days. There, the experiential educator directs exercises designed to promote any number of desired goals. Plaintiff's interest in experiential education began in the early 1970's when he was a teacher at an inner city school in St. Louis. He was frustrated by the lack of resources and finances to adequately handle the job. He believed that the system was failing in its mission. That, and his love of the outdoors, led him to SIU. Since then, his focus has been to perform as an experiential educator and teach others to do the same. By all accounts, plaintiff was very successful. Every description of his performance was glowing. Two younger experiential educators whom he had mentored resigned at least partly as a result of plaintiff's termination.

Touch of Nature continues to operate, as does the Wilderness Program. No one was hired or promoted to the position of associate director after plaintiff left. The director at the time plaintiff's contract was discontinued, Dr. Phil Lindberg, is no longer at Touch of Nature. The new director is Mark Cosgrove.

During the twelve months prior to his separation from SIU, plaintiff made 42 job applications. He received no interviews. Plaintiff recalled applying to RAVE in Anna, Illinois (an agency dealing with disabled adults), the Illinois Department of Youth Services, three applications to SIU and/or the SIU Foundation, the Big Muddy Correctional Center, the Illinois Center for Autism, and Boston College. He told Pam Brandt, the Department of Recreation chairperson, that he would consider other spots in that department. Plaintiff had prepared a more detailed listing of the applications he made, but he was prohibited from testifying about them as a discovery violation sanction which is fully discussed in the record. Plaintiff described the available jobs in experiential education as a "small pool." He believes his age is a serious handicap to finding another job in that field. Younger applicants are, he thinks, perceived as better able to handle the strenuous physical requirements of the work and are additionally attractive because they can be hired for less money. He points to the Boston College application as proof of this. The job there was very similar to the one he had at Touch of Nature. Even though plaintiff believes that he has more experience in the field than anyone in the country, he was denied an interview.

Plaintiff has not had a job since parting with SIU. A small winery which was previously an avocation has occupied his time. The moneymaking potential of that winery was not discussed by either side at trial.

Plaintiff still views himself as an experiential educator. He testified that until very recently he would have preferred nothing better than a return to his old job. Developments at Touch of Nature plus Mark Cosgrove's

trial testimony have caused plaintiff to doubt whether reinstatement would be in his best interests. That will be discussed in greater detail below.

II. Damages.

Plaintiff is entitled to back pay. 29 U.S.C. § 626(b). The only testimony on the appropriate amount of back pay came from plaintiff's expert, Dr. Leroy Grossman, whose qualifications were not challenged. Dr. Grossman figured plaintiff's lost earnings from August 15, 1994 – August 15, 1996, at $56,585.00. That takes into account the salary earned by plaintiff up to August 15, 1995, but adds a 3% cost of living adjustment he did not receive that year. Retirement and medical benefits are also calculated. The figure was not challenged by defendant. Dr. Grossman's worksheet was admitted as plaintiff's Exhibit 18. Beyond August 15, 1996, the back pay was calculated to be $151.31 per day. That figure was not challenged. It was, in fact, stipulated to defendant (see Doc. 59). The additional back pay, calculated to the date of trial, equals $36,61.02 [sic]. Total back pay from August 15, 1994, to the date of trial is $93,202.02.

The jury also found that the discrimination was willful. Pursuant to 29 U.S.C. § 626(b), plaintiff will receive liquidated damages equal to the back pay award of $93,202.02.

III. Equitable Relief

In addition to back pay, the Court has the power to grant equitable relief such as reinstatement or front pay.

Hybert v. Hearst Corp., 900 F.2d 1050 (7th Cir. 1990). The goal of such remedial power is to make the plaintiff whole by returning him to the position he would have occupied had the discrimination not occurred. *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986), *overruled in irrelevant part by Coston v. Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir. 1988). Reinstatement, unless inappropriate, is the preferred remedy. *Id.* Obviously, reinstatement precludes an award of front pay. The factors considered on the issue of reinstatement include hostility in the employment relationship and the lack of an available position to which to reinstate the plaintiff. *Downes v. Volkswagen of America*, 41 F.3d 1132, 1141 (7th Cir. 1994).

Prior to hearing evidence in the damages portion of this trial, defendant was asked whether it planned to offer plaintiff his job back. Defendant indicated that it would not do so because plaintiff's position, associate director, had been discontinued.

Plaintiff was asked what his preference would be, and he opted for front pay. A cynic might point to the front pay figures testified to by Dr. Grossman, anywhere from $691,300.00 to $834,047.00 depending on which retirement age is used, as motivating factors. It does seem at least logical that anyone given the option of choosing between that kind of money or working would choose the money. Rather, plaintiff relied on his concern that he might be returning to a hostile work environment. As noted earlier, Touch of Nature's director is now Mark Cosgrove. Cosgrove had been supervised by plaintiff in Touch of Nature's Underway program. Plaintiff testified that he had approached then director Phillip Lindberg

about reassigning Cosgrove from that program. No additional evidence was adduced concerning that episode. It is unknown whether Cosgrove was reassigned or whether any bad blood was generated. There is nothing from which to conclude that Cosgrove would be hostile toward plaintiff over it. Then, there came the "Duane Murphy story." Cosgrove testified during the liability portion of the trial. He was questioned about plaintiff's behavior after learning from Lindberg that Touch of Nature's budget deficits were ordered to be eliminated. Cosgrove recalled that plaintiff became reclusive, preferring to spend his time behind his closed office door. He likened plaintiff to a man named Duane Murphy who had worked at Touch of Nature sometime in the past. Apparently, Mr. Murphy was in his 60's and not the most sociable employee there. There was nothing palpably derogatory about Cosgrove's description of Duane Murphy or the comparison between plaintiff and him. Plaintiff, however, took alarm at the mention of his name in the same sentence with Duane Murphy. He interpreted it as ridicule which he fears would continue if he were to return. It is also pertinent to note that Mark Cosgrove very recently became Touch of Nature's director, a position to which plaintiff had aspired.

To conclude that plaintiff's return to Touch of Nature would be tainted by antagonism and hostility, based upon the evidence before the Court, would be speculative. Mark Cosgrove gave no indication of bad feelings toward plaintiff during his testimony. The "Duane Murphy story" did not come across at trial in the manner portrayed by plaintiff. I frankly was not sure what the story meant. There is a certain uneasiness provoked by

the firing and subsequent litigation. If that were justification to deny reinstatement, though, reinstatement would never be ordered again. *See U.S. E.E.O.C. v. Century Broadcasting Corp.*, 957 F.2d 1446, 1462 (7th Cir. 1992).

It is also understandable that plaintiff may be reluctant to return to Touch of Nature with Mark Cosgrove having just been appointed director. Cosgrove's very recent promotion makes it less likely that plaintiff will occupy that spot in the near future. That does not mean that plaintiff would be treated shabbily in the position he was terminated from. Diminished possibilities for advancement should not be a factor in fashioning an equitable remedy if, as here, plaintiff had no guarantee of moving up absent the discrimination.

Other factors favor reinstatement over front pay. The Seventh Circuit has held that an award of liquidated damages, particularly a substantial one as in this case, makes front pay inappropriate. *Tennes v. Commonwealth of Massachusetts, Department of Revenue*, 944 F.2d 372, 381 (7th Cir. 1991); *McNeil*, 800 F.2d at 118. Front pay is appropriate when the plaintiff has no reasonable prospect of obtaining employment or when the time period for which front pay is to be awarded is relatively short. *McNeil*, 800 F.2d at 118. Neither circumstance is presented in this case.

Finally, the decision of whether to fashion an equitable remedy and what it should be is "fact-specific and nuanced." *U.S. E.E.O.C. v. Century Broadcasting*, 977 F.2d at 1463. The trial court is afforded broad discretion to make its decision after "careful consideration of the particular facts of the case." *Tennes*, 944 F.2d at 381. The

factors considered include hostility in the workplace and the lack of an available position to which to reinstate plaintiff. *Downes v. Volkswagon of America, Inc.*, 41 F.3d 1132 (7th Cir. 1994). After doing so in this case, I have concluded that reinstatement is supported by both the law and sensibility. All of the evidence depicts plaintiff as a very dedicated and talented person who truly loved his work. He was in every respect a round peg in a round hole. The odds of him finding comparable work, particularly in this region, are very slim. Ironically, reinstatement also seems to be in defendant's interest. Plaintiff brought unique ability and a wealth of experience to the university in a field which sets it apart favorably from other schools. Plaintiff was an asset to the university and should continue to be. Defendant now faces either paying him a large amount of money for nothing in return or paying him to do valuable work. The choice does not seem difficult.

Defendant's reason for opposing reinstatement – no available position – is not sufficient to avoid it. Touch of Nature and the Wilderness Program continue to function. No one was hired to replace plaintiff, so this is not a situation where someone else would have to be fired to accommodate his return. If anything, Touch of Nature should be short one position with Mark Cosgrove's recent promotion to Director. Because reinstatement is the preferred remedy, defendant's position should be supported by some evidence of inappropriateness. Nothing was offered from anyone except defendant's argument through counsel that the position had been discontinued. That is not enough, although in fairness to defense counsel, she would have had a very difficult time mustering a

credible position. Touch of Nature accountant Al Bratten was less than flattering concerning Lindberg's management of Touch of Nature. It seems that the information fed to then SIU President John Guyon was not completely reliable. Dr. Guyon himself recognized that a letter signed by him, October 10, 1994, concerning the Wilderness Program (Pl.'s Ex. 10) seemed to be predicated on misinformation. There is no reason to believe that plaintiff cannot be restored to his position. Plaintiff will be ordered reinstated to his prior employment with all benefits and at a salary which reflects the 3% annual cost of living adjustment referred to by Dr. Grossman. Reinstatement shall be effective not later than August 15, 1997, provided that plaintiff shall receive $151.31 per day between the date of the final judgment in this case and the date on which he is reinstated to his prior employment.

Should plaintiff be penalized for not mitigating his damages by obtaining other employment? Defendant says "yes," and plaintiff says that defendant has waived that claim. Defendant has proposed that mitigation of damages is not an affirmative defense and cannot, therefore, be waived by defendant's failure to so plead it. Mitigation was not pleaded by defendant prior to trial. The support for defendant's position stems from the undisputed requirement that plaintiffs in cases such as this have a duty to mitigate their losses by making reasonable efforts to obtain other comparable employment. *See Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1986). Contrary to defendant's argument that does not place the burden of proof on plaintiff. Mitigation has been recognized by a majority of federal circuits as an affirmative defense, waivable if not raised. *Id.* at 1234.

The problem was addressed at trial. Plaintiff's attorneys could not express surprise, and defendant's pleadings were allowed to be amended at that point to affirmatively allege failure to mitigate. That ruling will not have consequences for plaintiff.

Mitigation of damages is not a front pay issue. As for back pay, defendant has failed to present evidence that would justify docking plaintiff for lack of diligence. Plaintiff is presumed to be entitled to full relief. *Hutchinson v. Amateur Electric Supply Inc.*, 42 F.3d 1037, 1044 (7th Cir. 1994). Defendant bore the burden of proving that plaintiff failed to exercise reasonable diligence to minimize his damages and that there was a reasonable likelihood that plaintiff might have found comparable work by exercising reasonable diligence. *Id.* As noted above, very little comparable work exists in this region. Plaintiff's family is established here. His wife is employed at a state mental hospital, and his daughters are in school. He owns property which has been developed well beyond the normal backyard vegetable garden. He has invested twenty years of his life here, and it is unrealistic and unfair to expect him to leave. Still, he did apply for jobs outside the region. He attempted to find employment within SIU's Recreation Department. He did not exhaust every possible lead or maybe even the best leads (defense counsel brought out that plaintiff did not exploit a job catalog published by a national association of experiential educators to which he belongs), but the law does not require that. He did look for other employment. Two other things factor in here. Although it was not fully explored by either side, there was at least an inference that plaintiff's winery was – perhaps will – expand into a moneymaker.

There was evidence that plaintiff was spending more time with it since his termination. That would be a logical fall back position for him had this litigation flopped, and it does have a logical bearing on the mitigation issue. Second, not much time elapsed between the time he left SIU and the time of trial. Not a lot could have been accomplished.

III. Attorneys' Fees

Attorneys' fees are awarded pursuant to 29 U.S.C. § 626(b) and 42 U.S.C. § 1988 on the basis that plaintiff is a prevailing party.[1] The applicants bear the burden of establishing the entitlement to fees and documenting the hours expended and hourly rates. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In calculating attorneys' fees, the Court first ascertains the "lodestar" figure, representing "the product of reasonable hours times a reasonable rate." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565 (1986). The Court may discount the total fee award based on various factors, including success. The focus is whether the fees are reasonable in relation to the overall relief obtained by the plaintiff. *Hensley*, 461 U.S. at 435.

The Court finds that $150.00 per hour is a reasonable rate for attorney Heller and that $100.00 per hour is a reasonable rate for attorney Gross, based on defendant's

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[1] The ADEA incorporates a portion of the Fair Labor Standards Act (FLSA) which provides that the Court shall allow a reasonable attorney's fee to be paid by the defendant. 29 U.S.C. § 216(b).

concession (Doc. No. 82). Defendant contests that $90.00 is an appropriate rate for attorney Shore because that rate is only ten dollars less than the rate billed for Mr. Gross. The Clerk's records indicate that this attorney was admitted to practice in this Court on March 22, 1994, and that he was admitted to practice in the State of Illinois on November 4, 1993. The Court is familiar with the rates charged by attorneys practicing in this area. The hourly rate of $90.00 is a reasonable and appropriate rate for an associate with Mr. Shore's several years of legal experience.

The reasonable service hours attributed to this litigation are assessed as follows: 155.55 hours for attorney Gross, 111.5 hours for attorney Heller, and 44.8 hours for attorney Shore.

These figures include the time itemized for post-trial legal services to date. They are lower than the figures submitted by plaintiff's counsel. The reduction accurately reflects the amount of time that was reasonable in relation to the difficulty, stakes, and outcome of the case. No reduction has been made based on limited or partial success, as it is clear that counsel hit the bull's-eye. Rather, specific billing entries were eliminated because the services performed were not adequately explained, because the services were found to be unreasonable or unnecessary, or because the charges were duplicated, as follows:

> 1/17/96 – .25 hours at $90 per hour are eliminated because Mr. Shore performed (locating and mailing a facsimile of a pleading) a clerical task that is generally considered as an overhead

expense and not billed separately as attorney's fees.

1/22/96 – .70 hours at $90 per hour are eliminated because Mr. Shore performed (copying depositions) a clerical task.

2/26/96 – .2 hours at $90 per hour are eliminated. The time used to prepare a motion for extension of time duplicates time billed on 2/6/96.

5/23/96 – .4 hours at $100 per hour are eliminated. The time spent preparing a waiver is not adequately explained and could not be clarified by counsel.

7/11/96 – 2.5 hours at $90 per hour are eliminated. Attorney Shore's time is not sufficiently explained. Absent some indication that Mr. Shore participated in or assisted the attorney participating in the pretrial conference, his presence is considered unnecessary multiple representation.

7/31/96 – part of this time is insufficiently explained (8 hours at $100 per hour for "deposition of Dr. Grossman") and part is unreasonable/duplicative (9.75 at $100 per hour). It was reasonable for the attorney responsible for the damages aspect of this case to travel to and from St. Louis, spend 5.75 hours conferring with counsel, ensuring that the deposition site was ready, preparing for the deposition, and taking the deposition. The time is reduced to 9.75 hours at $150.00 per hour.

3/6/97 – 2.5 hours at $90 per hour are eliminated. Attorney Shore's time is not sufficiently explained. Absent some indication that Mr. Shore participated in or assisted the attorneys

who participated in the pretrial conference, his presence is considered unnecessary multiple representation.

3/28/97 – 2 hours at $90 per hour are eliminated because Mr. Shore's time is not sufficiently explained. "Work on trial brief; work on case" does not permit an assessment of the reasonableness of the services performed.

4/14/97 – 4/17/97 – 29 hours at $90 per hour are eliminated because Mr. Shore's time is not sufficiently explained. The Court does not recall that Mr. Shore was seated at counsel table or that he was involved in the presentation of exhibits or testimony. It was the Court's impression that he observed the trial.

No reduction was made for the following contested billings entries:

2/8/96 – 4 hours at $100 for research regarding depositions. Time spent reviewing research and depositions coincided with the deadline for dispositive motions and was reasonable.

3/14/96 – 1.2 hours for research. This entry coincides with the filing of plaintiff's motion to strike defendant's summary judgment motion and is reasonable.

7/26/96 and 7/29/96 – attorney preparation of trial exhibits was reasonable.

11/01/96 – defense counsel misinterprets this as two separate entries by attorney Gross. The entry billed at $90 for 1.3 hours reflects time billed by attorney Shore. Mr. Shore's services on this date are not challenged.

4/7/97 – 3 entries for telephone conferences (.3, .3, and.2 hours) at $150 per hour are adequately explained. There is no basis to conclude that the services performed were duplicative.

4/7/97 – 3 hours at $100 per hour are reasonable for trial preparation at this stage of the litigation.

4/8/97 – .7 hours at $150 per hour are reasonable for conferences regarding the option of consenting to a trial before a Magistrate Judge.

4/8/97 – 4/17/97 – the trial preparation time was reasonable for the services of attorneys Heller, Gross, and Shore.

In sum, the lodestar is established as $36,312.00. Plaintiff shall recover this amount as attorneys' fees.

IV. Expenses

Plaintiff is also entitled to recover his "costs of the action."[2] Specifically, plaintiff is awarded the expenses of litigation that are distinct form either statutory costs (per Title 28 U.S.C. § 1920) or the costs reflected in the attorneys' hourly billing rates. This award includes such items as postage, long distance phone calls, photocopy charges, travel, paralegal fees, and witness fees and expenses. *Downes v. Volkswagen of America*, 41 F.3d at 1144. Unfortunately, many of the expenses for which reimbursement is sought are not documented or explained in a manner sufficient to permit a determination that all of the expenses were reasonably incurred. For example, more

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[2] See 29 U.S.C. § 216(b), made applicable by the ADEA.

than 85 hours of "research" were billed at $30 and $40 per hour. Very few entries contain information showing what topics were researched, and there is no information regarding the person or persons (paralegal?) who performed the research. While some research expense is certainly appropriate, plaintiff has not met his burden of showing that all of the research expenses incurred were reasonable. Similarly, travel expenses are requested for witnesses Will Marble and Susan Compagno; yet, there is no information to explain the nature of the expenses (first-class air fare?) that were incurred. Finally, the Radio Shack expenses are deemed to be operating expenses that are included in establishing hourly billing rates. Reasonable expenses are assessed as follows:

Facsimile communications	$ 41.00
Express mail charges	$ 10.75
Professional services of Dr. Grossman	$ 1,400.00
Reasonable travel costs (895 @ 30 cents)	$ 268.50
Reasonable research (40 hours @ $40/hr)	$ 1,600.00
Total Expenses:	$ 3,320.25

Fees taxable under 28 U.S.C. § 1920 will be assessed by the Clerk and are not included in this assessment.

Conclusion

IT IS ORDERED that plaintiff shall recover from defendant back pay in the amount of $93,202.02 and liquidated damages in the amount of $93,202.02.

IT IS FURTHER ORDERED that plaintiff be reinstated to his former position as Associate Director of the Touch of Nature Environmental Center by August 15, 1997.

IT IS FURTHER ORDERED that plaintiff shall recover attorneys' fees in the amount of $36,312.00 and litigation expenses in the amount of $3,320.25.

IT IS SO ORDERED.

DATED: May 23, **A.D. 1997.**

/S/ Philip M. Frazier
PHILIP M. FRAZIER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THEODORE F. WICHMANN,	)	
Plaintiff,	)	**No. 95-CV-4134-JPG**
v.	)	**(Filed Aug. 1 96)**
BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY and PHILLIP A. LINDBERG,	)	
Defendants.	)	

MEMORANDUM AND ORDER

GILBERT, Chief Judge:

Plaintiff Theodore F. Wichmann ("Wichmann") was the Associate Director of the Touch of Nature Environmental Center ("Touch") of Southern Illinois University ("SIU") until August 15, 1994. On that date SIU terminated Wichmann's employment. Believing that SIU's decision was based on his age, he filed suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* SIU has filed a motion to dismiss for lack of subject matter jurisdiction contending that the Eleventh Amendment bars relief against it under the ADA. Wichmann has filed a motion to strike the motion to dismiss contending that it was filed after the deadline for dispositive motions set in the scheduling and discovery order.

The motion to strike may be dispensed with summarily. Although the motion to dismiss was filed after the

deadline for dispositive motions, subject matter jurisdiction cannot be waived and may be challenged by a party or raised *sua sponte* by the court at any time. *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 179 (7th Cir. 1994). Consequently, this Court has a duty to examine its subject matter jurisdiction at any time during the litigation and that duty is not limited by deadlines set in the scheduling and discovery order. Accordingly, the motion to strike is denied and the Court will proceed to an examination of the motion to dismiss.

SIU's motion to dismiss is based on the recent case *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). In that case, the Supreme Court, consistent with its prior rulings, held that in order to determine whether Congress has abrogated a States' Eleventh Amendment immunity, a court must look at: (1) whether Congress has unequivocally expressed its intent to abrogate the immunity; and (2) whether Congress has acted pursuant to a valid exercise of power. *Id.* at 1123. The change in the law wrought by *Seminole Tribe*, and the ground relied on by SIU, is that the Supreme Court held that Congress cannot abrogate a State's Eleventh Amendment immunity by using its Article I powers. *Id.* at 1131-32. SIU asserts that the change in definition of employer under the ADEA to include states was done through an amendment enacted by Congress as part of amendments to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* SIU argues that this change did not indicate an intent to abrogate the States' Eleventh Amendment immunity. Furthermore, SIU argues that the amendment to the ADEA was enacted pursuant to the Commerce Clause of Article I and thus is

not a valid exercise of Congress' power to abrogate the States' Eleventh Amendment immunity.

The Court disagrees with SIU's position that Congress did not intent [sic] to waive the States' Eleventh Amendment immunity when it changed the definition of employer under the ADEA to include the States. Unfortunately for SIU, there is binding Seventh Circuit precedent that holds that it is unmistakably clear that Congress waived the States' Eleventh Amendment immunity in enacting the amendment to the ADEA. *See Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990) ("Unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases – and that degree of explicitness is not required, it could not have made its desire to override the states' sovereign immunity clearer." (citations omitted)). The Court does not feel that the holding of *Davidson* is undermined in any way by the fact that one of the authorities relied upon by the Seventh Circuit is the now discredited case of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), wherein the Supreme Court held that Congress could abrogate the States' Eleventh Amendment immunity under Article I. As the Seventh Circuit pointed out, there is no requirement that the statute state something like "Congress is waiving the States' Eleventh Amendment immunity under this Act." Indeed, in *Seminole Tribe*, the Supreme Court found it sufficient that numerous references in the text of the statute made references to the "State". 116 S. Ct. at 1124. The Court sees no logical reason why Congress would add States to the definition of employer under the ADEA if it did not intend to waive the States' Eleventh Amendment immunity. Otherwise,

the Court would need to make the absurd assumption that Congress was merely hoping that the States would consent to suit on their own, something that any State is unlikely to do. Therefore, the Court holds that the ADEA meets the first part of the test in that it contains an unequivocal intent to waive the States' Eleventh Amendment immunity.

SIU argument regarding whether the attempt to abrogate the States' Eleventh immunity was a valid exercise of power runs into the same problem as its prior argument, namely, biding Seventh Circuit precedent that holds precisely the opposite of its position. Before we get to that case, the Court must deal with SIU contention that the Supreme Court held in *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), that the amendment to the ADEA was enacted pursuant to the Commerce Clause of Article I. In that case, the Supreme Court held that the amendment to the ADEA was a valid exercise of Congress' powers under the Commerce Clause. *Id.* at 243. However, the Court expressly reserved the question whether the amendment to the ADEA was a valid exercise of Congress' powers under Section 5 of the Fourteenth Amendment. *Id.* Thus, the case does not stand for the proposition that the amendment to the ADEA was enacted *solely* under the Commerce Clause but rather that it was justified as an exercise of power under the Commerce Clause. The distinction is made clear in a footnote to the opinion wherein the Supreme Court states that the district court erred in believing that a statute could not be upheld under Section 5 of the Fourteenth Amendment unless Congress "expressly articulated its intent to legislate under § 5." *Id.* at 243 n.18. Rather, the Supreme Court stated that a valid

exercise of power under Section 5 does not require that Congress recite the words "section 5" or "Fourteenth Amendment" or "equal protection". *Id.* Indeed, the Supreme Court stated that " '[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.' " *Id.* (citing *Woods v. Miller*, 333 U.S. 138, 144 (1948)); *see also E.E.O.C. v. Elrod*, 674 F.2d 601, 608 (7th Cir. 1982) ("[T]he test of whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment requires no talismanic intoning of the amendment. Rather, the inquiry is whether the *objectives* of the legislation are within Congress' power under the amendment." (citation omitted)). As a consequence, the fact that the amendment to the ADEA was enacted as part of amendments to the FLSA that were clearly enacted under the Commerce Clause does not end the inquiry as long as Congress had the power to enact the amendment to the ADEA under Section 5.

With this understanding in mind, the Court may turn to the binding Seventh Circuit precedent referred to earlier. In *Elrod*, 674 F.2d at 603, the Seventh Circuit held that the amendment to the ADEA "is a constitutional exercise of Congress' power under § 5 of the Fourteenth Amendment." Nothing in *Seminole Tribe* has undermined this decision by the Seventh Circuit and thus it is still good law in this circuit that binds this Court. Accordingly, the Court holds that the amendment to the ADEA was a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment. In conjunction with the Court's previous holding that the amendment to the ADEA contained an unequivocal intent to waive the States' Eleventh Amendment immunity, this leads to the conclusion

that the amendment to the ADEA has validly waived the States' Eleventh Amendment immunity from suit.

For the reasons stated, the motion to strike [Doc. 44] is **DENIED**. The Motion to dismiss for lack of subject matter jurisdiction [Doc. 34] is **DENIED.**

IT IS SO ORDERED.

DATED: July 31, 1996

/s/ J. Phil Gilbert
J. PHIL GILBERT
CHIEF JUDGE

USCA CONST Art. I s 8, cl. 1

Section 8, Clause 1. Powers of Congress; Levy of Taxes for Common Defense and General Welfare; Uniformity of Taxation

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

USCA CONST Amend. XI

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

USCA CONST Amend XIV s 5

Section 5. Legislation for Enforcement of Article

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub.L. 90-202, § 2, Dec. 15, 1967, 81 Stat. 602.)

29 U.S.C. § 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures –

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

(Pub. L. 90-202, § 3, Dec. 15, 1967, 81 Stat. 602.)

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of

employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of

Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 681(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the –

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits –

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision

imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan –

(A) If distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of an adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury.

Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(b) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m).

(7) Any regulations prescribed by the Secretary of the treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D)[1] of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect

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[1] See References in Text note below.

to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection –

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(a) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken –

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained –

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1988; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of –

(I) The age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

***(l)* Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits**

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section –

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for –

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age –

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) The values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount

of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that –

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age) –

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit

package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions) –

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if –

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

(Pub.L 90-202, § 4, Dec. 15, 1967, 81 Stat. 603; Pub.L. 95-256, § 2(a), Apr. 6, 1978, 92 Stat. 189; Pub.L. 97-248, Title I, § 116(a), Sept. 3, 1982, 96 Stat. 353; Pub.L. 98-369, Div. B, Title III, § 2301(b), July 18, 1984, 98 Stat. 1063; Pub.L. 98-459; Title VIII, § 802(b), Oct. 9, 1984, 98 Stat. 1792; Pub.L. 99-272, Title IX, § 9201(b)(1), (3), Apr. 7, 1986, 100 Stat. 171; Pub.L. 99-509, Title IX, § 9201, Oct. 21, 1986, 100 Stat. 1973; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-592, §§ 2(a), (b), 3(a), Oct. 31, 1986, 100 Stat. 3342; Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233; Pub.L. 101-433, Title I, § 103, Oct. 16, 1990, 104 Stat. 978; Pub.L. 101-521, Nov. 5, 1990, 104 Stat. 2287; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 119, subsec. 1(b)], Sept. 30, 1996, 110 Stat. 3009-23; Pub.L. 105-244, Title IX, § 941(a), (b), Oct. 7, 1998, 112 Stat. 1834, 1835.)

29 U.S.C. § 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include –

> (A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;
>
> (B) a determination of the feasibility of eliminating such limitation;
>
> (C) a determination of the feasibility of raising such limitation above 70 years of age; and
>
> (D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (A) of this section shall be transmitted to the President and to the Congress

as an interim report no later than January 1, 1981, and in final form not later than January 1, 1982.

(Pub.L. 90-202, § 5, Dec. 15, 1967, 81 Stat. 604; Pub.L. 95-256, § 6, Apr. 6, 1978, 92 Stat. 192.)

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29 U.S.C. § 625. Administration

The Secretary shall have the power –

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

(Pub.L. 90-202, § 6, Dec. 15, 1967, 81 Stat. 604.)

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29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate

to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person

defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the

individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group of class of employees, the employer (at the commencement of the period specified in subparagraph (f)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(Pub.L. 90-202, § 7, Dec. 15, 1967, 81 Stat. 604; Pub.L. 95-256, § 4(a), (b)(1), (c)(1), Apr. 6, 1978, 92 Stat. 190, 191; 1978 Reogr. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 101-433, Title II, § 201, Oct. 16, 1990, 104 Stat. 983; Pub.L. 102-166, Title I, § 115, Nov. 21, 1991, 105 Stat. 1079.)

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29 U.S.C. § 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places

upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

(Pub.L. 90-202, § 8, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat.)

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29 U.S.C. § 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

(Pub.L. 90-202, § 9, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

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29 U.S.C. § 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it

is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

(Pub.L. 90-202, § 10, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

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29 U.S.C. § 630. Definitions

For the purposes of this chapter –

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such

term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by

the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

(Pub.L. 90-202, § 11, Dec. 15, 1967, 81 Stat. 605; Pub.L. 93-259, § 28(a)(1)-(4), Apr. 8, 1974, 88 Stat. 74; Pub.L. 98-459, Title VIII, § 802(a), Oct. 9, 1984, 98 Stat. 1792; Pub.L. 99-592, § 4, Oct. 31, 1986, 100 Stat. 3343; Pub.L. 101-433, Title I, § 102, Oct. 16, 1990, 104 Stat. 978.)

29 U.S.C. § 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be

adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(Pub.L. 90-202, § 12, Dec. 15, 1967, 81 Stat. 607; Pub.L. 95-256, § 3(a), (b)(3), Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 98-459, Title VIII, § 802(c)(1), Oct. 9, 1984, 98 Stat. 1792; Pub.L. 99-272, Title IX, § 9201(b)(2), Apr. 7, 1986, 100 Stat. 171; Pub.L. 99-592, §§ 2(c), 6(a), Oct. 31, 1986, 100 Stat. 3342, 3344; Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(ii), Dec. 19, 1989, 103 Stat. 2233.)

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29 U.S.C. § 632. Annual report to Congress

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering its activities for the preceding year and including such information, data and recommendations for further legislation in connection with the matters covered by this chapter as it may find advisable. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration

any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

(Pub.L. 90-202, § 13, Dec. 15, 1967, 81 Stat. 607; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

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29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State

law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

(Pub.L. 90-202, § 14, Dec. 15, 1967, 81 Stat. 607.)

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29 U.S.C. § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the

judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final actions on complaint of discrimination; exemptions; bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall –

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

(Pub.L. 90-202, § 15, as added Pub.L. 93-259, § 28(b)(2), Apr. 8, 1974, 88 Stat. 74, and amended Pub.L. 95-256, § 5(a), (e), Apr. 6, 1978, 92 Stat. 191; 1978 Reorg. Plan No. 1, eff. Jan. 1, 1979, § 2, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 104-1, Title II, § 201(c)(2), Jan. 23, 1995, 109 Stat. 8; Pub.L. 105-220, Title III, § 341(b), Aug. 7, 1998, 112 Stat. 1092.)

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29 U.S.C. § 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

(Pub.L. 90-202, § 17, formerly § 16, Dec. 15, 1967, 81 Stat. 608, renumbered and amended Pub.L. 98-259, § 28(a)(5),

(b)(1), Apr. 8, 1974, 88 Stat. 74; Pub.L. 95-256, § 7, Apr. 6, 1978, 92 Stat. 193.)

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29 U.S.C.A. § 216

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any

judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall

* * *

PL 93-259, 1974 S 2747

PL 93-259 (S 2747)
APRIL 8, 1974

TO AMEND THE FAIR LABOR STANDARDS ACT OF 1938 TO INCREASE THE MINIMUM WAGE RATE UNDER THAT ACT, TO EXPAND THE COVERAGE OF THE ACT, AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED.

SHORT TITLE; REFERENCES TO ACT

SECTION 1. (A) THIS ACT MAY BE CITED AS THE "FAIR LABOR STANDARDS AMENDMENTS OF 1974".//298 USC 203 NOTE.//

(B) UNLESS OTHERWISE SPECIFIED, WHENEVER IN THIS ACT AN AMENDMENT OR REPEAL IS EXPRESSED IN TERMS OF AN AMENDMENT TO, OR REPEAL OF, A SECTION OR OTHER PROVISION, THE SECTION OR OTHER PROVISION AMENDED OR

REPEALED IS A SECTION OR OTHER PROVISION OF THE FAIR LABOR STANDARDS ACT OF 1938 (29 U.S.C. 201-219). //52 STAT. 1060.//

* * *

FEDERAL AND STATE EMPLOYEES

SEC. 6. (A)(1) SECTION 3(D) IS AMENDED TO READ AS FOLLOWS: /52 STAT. 1060; 80 STAT. 830, 29 USC 203.//

"(D) 'EMPLOYER' INCLUDES ANY PERSON ACTING DIRECTLY OR INDIRECTLY IN THE INTEREST OF AN EMPLOYER IN RELATION TO AN EMPLOYEE AND INCLUDES A PUBLIC AGENCY, BUT DOES NOT INCLUDE ANY LABOR ORGANIZATION (OTHER THAN WHEN ACTING AS AN EMPLOYER) OR ANYONE ACTING IN THE CAPACITY OF OFFICER OR AGENT OF SUCH LABOR ORGANIZATION."

(2) SECTION 3(E) IS AMENDED TO READ AS FOLLOWS:

"(E)(1) EXCEPT AS PROVIDED IN PARAGRAPHS (2) AND (3), THE TERM 'EMPLOYEE' MEANS ANY INDIVIDUAL EMPLOYED BY AN EMPLOYER.

"(2) IN THE CASE OF AN INDIVIDUAL EMPLOYED BY A PUBLIC AGENCY, SUCH TERM MEANS –,

"(A) ANY INDIVIDUAL EMPLOYED BY THE GOVERNMENT OF THE UNITED STATES –,

"(I) AS A CIVILIAN IN THE MILITARY DEPARTMENTS (AS DEFINED IN SECTION 102 OF TITLE 5, UNITED STATES CODE). //80 STAT. 378.//

"(II) IN ANY EXECUTIVE AGENCY (AS DEFINED INSPECTION 105 OF SUCH TITLE),

"(III) IN ANY UNIT OF THE LEGISLATIVE OR JUDICIAL BRANCH OF THE GOVERNMENT WHICH HAS POSITIONS IN THE COMPETITIVE SERVICE,

"(IV) IN A NONAPPROPRIATED FUND INSTRUMENTALITY UNDER THE JURISDICTION OF THE ARMED FORCES, OR

"(V) IN THE LIBRARY OF CONGRESS;

"(B) ANY INDIVIDUAL EMPLOYED BY THE UNITED STATES POSTAL SERVICE OR THE POSTAL RATE COMMISSION; AND

"(C) ANY INDIVIDUAL EMPLOYED BY A STATE, POLITICAL SUBDIVISION OF A STATE, OR AN INTERSTATE GOVERNMENTAL AGENCY, OTHER THAN SUCH AN INDIVIDUAL –,

"(I) WHO IS NOT SUBJECT TO THE CIVIL SERVICE LAWS OF THE STATE, POLITICAL SUBDIVISION, OR AGENCY WHICH EMPLOYS HIM; AND

"(II) WHO –,

"(I) HOLDS A PUBLIC ELECTIVE OFFICE OF THAT STATE, POLITICAL SUBDIVISION, OR AGENCY,

"(II) IS SELECTED BY THE HOLDER OF SUCH AN OFFICE TO BE A MEMBER OF HIS PERSONAL STAFF,

"(III) IS APPOINTED BY SUCH AN OFFICEHOLDER TO SERVE ON A POLICYMAKING LEVEL, OR

"(IV) WHO IS AN IMMEDIATE ADVISER TO SUCH AN OFFICEHOLDER WITH RESPECT TO THE CONSTITUTIONAL OR LEGAL POWERS OF HIS OFFICE.

"(3) FOR PURPOSES OF SUBSECTION (U), SUCH TERM DOES NOT INCLUDE ANY INDIVIDUAL EMPLOYED BY AN EMPLOYER ENGAGED IN AGRICULTURE IF SUCH INDIVIDUAL IS THE PARENT, SPOUSE, CHILD, OR OTHER MEMBER OF THE EMPLOYER'S IMMEDIATE FAMILY."

(3) SECTION 3(H) IS AMENDED TO READ AS FOLLOWS: //52 STAT. 1060.// "(H) 'INDUSTRY' MEANS A TRADE, BUSINESS, INDUSTRY, OR OTHER ACTIVITY, OR BRANCH OR GROUP THEREOF, IN WHICH INDIVIDUALS ARE GAINFULLY EMPLOYED.".

(4) SECTION 3(R) //75 STAT. 65; 86 STAT. 375.// IS AMENDED BY INSERTING "OR" AT THE END OF PARAGRAPH (2) AND BY INSERTING AFTER THAT PARAGRAPH THE FOLLOWING NEW PARAGRAPH:

"(3) IN CONNECTION WITH THE ACTIVITIES OF A PUBLIC AGENCY.".

(5) SECTION 3(A) IS AMENDED – //80 STAT. 831; 86 STAT. 375.//

(A) BY STRIKING OUT IN THE MATTER PRECEDING PARAGRAPH (1) "INCLUDING EMPLOYEES HANDLING, SELLING, OR OTHERWISE WORKING ON GOODS" AND INSERTING IN LIEU THEREOF "EMPLOYEES HANDLING, SELLING, OR OTHERWISE WORKING ON GOODS OR MATERIALS",

(B) BY STRIKING OUT "OR" AT THE END OF PARAGRAPH (3), //80 STAT. 831, 26 USC 203.//

(C) BY STRIKING OUT THE PERIOD AT THE END OF PARAGRAPH (4) AND INSERTING IN LIEU THEREOF"; OR ".

(D) BY ADDING AFTER PARAGRAPH (4) THE FOLLOWING NEW PARAGRAPH:

(5) BY ADDING AFTER THE LAST SENTENCE THE FOLLOWING NEW SENTENCE: "THE EMPLOYEES OF AN ENTERPRISE WHICH IS A PUBLIC AGENCY SHALL FOR PURPOSES OF THIS SUBSECTION BE DEEMED TO BE EMPLOYEES ENGAGED IN COMMERCE, OR IN THE PRODUCTION OF GOODS FOR COMMERCE, OR EMPLOYEES HANDLING, SELLING, OR OTHERWISE WORKING ON GOODS OR MATERIALS THAT HAVE BEEN MOVED IN OR PRODUCED FOR COMMERCE.".

(6) SECTION 3 IS AMENDED BY ADDING AFTER SUBSECTION (W) THE FOLLOWING: //52 STAT. 1060; 80 STAT. 832.//

"NX) 'PUBLIC AGENCY' MEANS THE GOVERNMENT OF THE UNITED STATES; THE GOVERNMENT OF A STATE OR POLITICAL SUBDIVISION THEREOF; ANY AGENCY OF THE UNITED STATES (INCLUDING THE UNITED STATES POSTAL SERVICE AND POSTAL RATE COMMISSION), A STATE, OR A POLITICAL SUBDIVISION OF A STATE; OR ANY INTERSTATE GOVERNMENTAL AGENCY.".

* * *

No. 99-411

IN THE

Supreme Court of the United States

BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,

Petitioner,

v.

THEODORE WICHMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In addition to the question contained in the Petition, Respondent presents the following question:

Did the Petitioner waive its right to assert Eleventh Amendment immunity by proceeding to trial?

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STATEMENT OF THE CASE

The "factual background" contained in the Petition is inaccurate. Theodore Wichmann was discharged from his position as Associate Director of Southern Illinois University's (S.I.U.) Touch Of Nature Environmental Center. Dr. Wichmann had worked for the Center for 19 years and was very good at his job. Job descriptions at the Center were meaningless and had been manipulated for various purposes and no positions were eliminated in connection with Wichmann's discharge. After the discharge, when asked why Wichmann was fired, the Supervisor, Dr. Phillip Lindberg, stated: "Susan, think of it like this: In a forest you have to cut down the old, big trees so the little trees underneath can grow". Wichmann was the "old tree" and younger employees, who received promotions and pay raises as a result of the discharge, were the "little trees". Wichmann was terminated because of his age.

ARGUMENT

A. Abrogation Of Sovereign Immunity

This Court should deny the Writ of Certiorari because Congress abrogated the State's sovereign immunity under the Eleventh Amendment from suit in Federal Court under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, (ADEA) pursuant to a valid exercise of power. The arguments for and against this position have been fully set forth in the briefs submitted in *Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir.), *rehearing en banc denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (U.S. Jan. 25, 1999) (No. 98-791). The Seventh Circuit decision in this case *Wichmann v. Board of Trustees*

of S. Illinois Univ., 180 F.3d 791 (7th Cir. 1999) and its prior decision in *Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761 (7th Cir. 1998) are proper and correct analyses of law and application of principles of sovereign immunity under the Eleventh Amendment.[1]

1.- Congress must make its intention to abrogate state sovereign immunity under the Eleventh Amendment for violations of the ADEA "unmistakably clear in the language of the statute". *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The court below correctly found that this intent to abrogate is present in the ADEA. In 1974, Congress amended the ADEA to expand the definition of "employer" to expressly include "a State or political subdivision of a state or any instrumentality of a State". Fair Labor Standards Act ("FLSA") Amendments of 1974, Pub. L. 93-259, Sec. 28, 88 Stat. 74 (amending and incorporated by reference in the ADEA, 29 U.S.C. § 630(b)(2)).

The court below held that: "unless Congress had said in so many words that it was abrogating the States' sovereign immunity in age discrimination cases — and that degree of explicitness is not required . . . — it could not have made its desire to override the States' sovereign immunity clearer". *Wichmann*, 180 F.3d at 797, *quoting Davidson v. Board of*

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1. This is the position accepted by the majority of Circuit Court of Appeals: *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Coger v. Board of Regents of State of Tenn.*, 154 F.3d 296 (6th Cir. 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493 (5th Cir. 1998). Contrary decisions have been reached in *Kimel*, 139 F.3d 1426 and *Humeanansky v. Regents of University of Minn.*, 152 F.3d 822 (8th Cir. 1998).

Governors of State Colleges and Univ., 920 F.2d 441, 443 (7th Cir. 1990). This Court's dictum also supports intent to abrogate. In *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (dictum), the Court acknowledged that: "there is no doubt what the intent of Congress was; to extend the application of the ADEA to the States".

2. Congress acted pursuant to a valid exercise of power in extending the ADEA to States. The court below has correctly held that the ADEA represents a valid exercise of Congress' power under § 5 to enforce the provisions of the Fourteenth Amendment. Equal Protection has long been held to require all state classification of persons to have at least a rational basis, treating similarly all similarly situated individuals. *Goshtasby v. Board of Trustees of Univ. of Illinois*, 141 F.3d 761, 771 (7th Cir. 1998) (*citing City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)).

In exercising its § 5 power, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts". *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The court below correctly observed that: "Equal Protection is not limited to a closed short list of privileged classifications and the Supreme Court has subjected age classifications to rational basis review". *Wichmann*, 80 F.3d at 797, *citing Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). The ADEA is an appropriate remedial and preventive exercise of power because it is directed at arbitrary and invidious discrimination.

Congress engaged in substantial fact finding and debate before it pronounced that older workers were "being deprived of employment on the basis of inaccurate and stigmatizing stereotypes". *Hazen Paper Co., v. Biggins*, 507 U.S. 604, 610 (1993). This Court has characterized the ADEA itself as directed at "invidious bias". *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). Additionally, this Court has identified the purpose of the ADEA as "elimination of discrimination in the workplace". *Oscar Mayer and Co. v. Evans*, 441 U.S. 750, 756 (1979).

Based upon the foregoing and the arguments in *Kimel*, 139 F.3d 1426 the Court should deny the Petition.

B. By Failing To Take An Interlocutory Appeal And Proceeding To Trial On The Merits S.I.U. Waived Its Right To Assert Eleventh Amendment Immunity.

Pursuant to Supreme Court Rule 15.2, regardless of the ruling in *Kimel*, 139 F.3d 1426, as an alternative reason for denying the Writ, Plaintiff argues that the nature of Eleventh Amendment immunity and the procedural background of this case dictate that the claim of Eleventh Amendment immunity in this case be deemed waived.

Plaintiff asserted below that S.I.U. waived the Eleventh Amendment argument by failing to take an interlocutory appeal. The court below summarily dismissed this argument as without merit. *Wichmann*, 180 F.3d at 797, *citing Patsy v. Board of Regents of Florida*, 457 U.S. 496, 516 n.19 (1982). Because of the unique nature of Eleventh Amendment immunity the question of waiver should be explored by the Court. *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 388 (1998) (concurring opinion of Justice Kennedy).

A motion by a State to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection whose resolution will have no bearing on the merits of the underlying action. The immunity claim is asserting the right to avoid trial in Federal Court, not immunity from damages. The value to the State of its Eleventh Amendment immunity is, for the most part, lost as litigation proceeds past motion practice. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.*, 506 U.S. 139, 145 (1993). For this reason the Court has recognized the absolute right of a State to seek an interlocutory appeal, under the collateral order doctrine, to vindicate the right not to be tried. *Id.*

In the case before the Court, S.I.U. raised the issue of immunity in a pre-trial motion, which was denied by the trial court. The University chose not to appeal but to continue to object while proceeding to trial on the merits. To allow S.I.U. the opportunity to avoid the judgment by raising the immunity issue post-trial permits the University to proceed to judgment without facing any risk of adverse consequences. By allowing a claim of Eleventh Amendment immunity to be raised at any time is to treat such claim as in the nature of an objection to subject matter jurisdiction. *Schacht*, 524 U.S. 381, 388-89 (1998) (concurring opinion). A claim of Eleventh Amendment sovereign immunity should not be treated as a claim of lack of subject matter jurisdiction because there are significant differences between the two principles. First, a claim of sovereign immunity may be waived, but lack of subject matter jurisdiction may never be waived. In addition, a Court must raise lack of subject matter jurisdiction *sua sponte* but need not so raise a claim of Eleventh Amendment sovereign immunity. *Id.* Therefore, there is no logical basis for treating a claim of sovereign immunity as tantamount to a lack of subject matter in Federal Court.

This apparent illogical treatment of Eleventh Amendment immunity is clearly presented by Justice Kennedy in the concurring opinion in *Schacht*, 524 U.S. 381, 388 (1998). Given the choice, it would be foolish trial practice for any State to take an interlocutory appeal on Eleventh Amendment immunity grounds when they could try their case to a jury and reject the verdict, if unfavorable, on Eleventh Amendment immunity grounds. It is this logic which lends support for the notion that a claim of Eleventh Amendment immunity should be treated in practice as an objection to personal jurisdiction.

This concept has recently been embraced by the Ninth Circuit Court of Appeals in *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 758 (9th Cir. 1999). In *Blind Industries* the Ninth Circuit held that a claim of Eleventh Amendment immunity was waived when it was asserted shortly before trial. The Ninth Circuit apparently adopted a rule similar to that proposed by Justice Kennedy's concurrence in *Schacht* without distinguishing *Pasty v. Board of Regents of Florida*, 457 U.S. 496 (1982) and other precedent.

By adopting a rule which requires the states to assert Eleventh Amendment immunity at the outset of the proceedings, and to perfect an interlocutory appeal of a denial of its assertion, the immunity issue could be resolved without a waste of judicial resources. This case provides the perfect example since, in by-passing the right to interlocutory appeal, the parties have engaged in discovery, jury trial and appeal of trial issues. The University asserted various affirmative defenses and actively litigated the merits of the claim. Failure to take an interlocutory appeal or belated assertion of Eleventh Amendment immunity is more in the nature of

direct invocation of the jurisdiction in the Federal Court. (*Schacht*, concurring opinion 524 U.S. 381, 389 (1998)). Once a case proceeds to trial, the rationale for Eleventh Amendment protection is lost.

Additional hardship results if this rule is not adopted. In this case Theodore Wichmann, a nationally recognized specialist, has not worked in his profession since August 15, 1996. His discharge was a result of age discrimination which is prohibited by the laws of the State of Illinois in addition to the ADEA. 775 ILCS 5/2-101(B)(1)(C). All evidentiary issues raised at trial have been resolved favorably to Dr. Wichmann. *Wichmann*, 180 F.3d 791 (7th Cir. 1999). By raising the Eleventh Amendment immunity issue post-trial S.I.U. has obtained a stay of reinstatement which has been in effect for over two years. Had the University pursued the immunity claim by interlocutory appeal under the collateral order doctrine the jurisdictional questions would have been resolved prior to trial. The University has frustrated the ends of justice by effectively denying Dr. Wichmann's right to return to his prior position. Reversal and remand at this point in time leaves Dr. Wichmann in a procedural abyss. His right to return to work has clearly been established but he may reach retirement age before ultimate resolution. For these practical reasons, claims for Eleventh Amendment immunity should be quickly addressed, or deemed waived as are claims of lack of personal jurisdiction. To accomplish that end requires a ruling that failure to take an interlocutory appeal results in waiver of the immunity claim.

On this basis, the Petition for a Writ of Certiorari should also be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 17 1999
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No. 99-411

In The

Supreme Court of the United States

THE BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,

Petitioner,

vs.

THEODORE WICHMANN

AND

UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO RESPONDENT WICHMANN'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO RESPONDENT WICHMANN'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner The Board of Trustees of Southern Illinois University ("SIU") submits its Reply Brief to Respondent Theodore Wichmann's ("Wichmann") Brief in Opposition to SIU's Petition for a Writ of Certiorari.[1] Wichmann argues that SIU waived its Eleventh Amendment sovereign immunity defense by not taking an interlocutory appeal from the district court's pretrial denial of that defense. This argument should fail. First, Wichmann's waiver argument is procedurally barred because it seeks review of a new point of law not addressed in SIU's Petition. Second, the argument fails on the merits, as courts have allowed a party to wait until after trial to appeal a pretrial denial of an immunity defense.

I. ARGUMENT

A. Wichmann's Argument That SIU Waived Its Right To Assert Eleventh Amendment Immunity Is Procedurally Barred.

SIU's petition for a writ of certiorari raises only the issue of whether Congress validly abrogated the States' Eleventh Amendment sovereign immunity from suit under the ADEA. Wichmann's response seeks to present for review an additional legal issue, *i.e.*, whether SIU is barred from asserting sovereign immunity because it did not file an interlocutory appeal from the district court's

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[1] As the Brief of The United States does not raise new matters, no reply thereto is necessary or appropriate.

pretrial denial of that defense. Wichmann concedes that this additional legal issue was not addressed by SIU, stating in its questions presented that the issue is *"[i]n addition* to the question contained in the Petition." Respondent's Brief at p. i (emphasis added).

Wichmann's argument is procedurally barred as it places a new question of law before this Court. Pursuant to Rule 15(2) of the Rules of the Supreme Court of the United States, a brief in opposition to a petition for a writ of certiorari should "address arguments for denying the petition" and "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Therefore, Wichmann may properly address the legal and factual contentions raised by SIU in its petition for a writ of certiorari. However, the Rules of the Supreme Court do not permit Wichmann to raise a completely new issue of law for this Court's review in his opposition brief. For this reason, Wichmann's argument that SIU waived its Eleventh Amendment immunity is procedurally barred, and should not be considered by this Court in its ruling on SIU's petition for a writ of certiorari.

B. A Party May Wait Until After Trial To Appeal The Pretrial Denial Of A Sovereign Immunity Defense.

Even if Wichmann's waiver argument were properly before this Court, the argument fails on the merits. The courts are unanimous in their conclusion that a party does not waive an immunity defense by not taking a

permissive interlocutory appeal of a pretrial denial of such a defense.

The Tenth Circuit expressly rejected the waiver argument Wichmann makes in *Fletcher v. United States*, 116 F.3d 1315, 1325 (10th Cir. 1997), concluding that the "failure to take an interlocutory appeal under the section does not waive sovereign immunity." This point was also made clear in *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988), where the court concluded that the defendant had not waived a qualified immunity defense by not taking an interlocutory appeal, reasoning:

> We are not persuaded that the exception that *Mitchell v. Forsyth*, 472 U.S. 511 (1985) carved from the finality of judgment rule was intended to override the general doctrine of appealability. There may be good reasons why a defendant may elect to not appeal before trial, and we see little value in a rule of waiver that would force unwanted appeals, many of which undoubtedly never would have been necessary. In short, the right to appeal before trial belongs to a defendant, protecting him from money damages as well as from the costs of defending a suit. We see no reason to force pretrial appeals.

Id. at 755. *See also Hamm v. Powell*, 874 F.2d 766, 770 (11th Cir. 1989), *cert. denied*, 496 U.S. 938 (1990) (holding that "[t]he defense of qualified immunity is not waived if an official chooses not to take an immediate appeal from the denial of a motion for summary judgment"); *Goff v. Bise*, 173 F.3d 1068, 1071 (8th Cir. 1999) (holding that "a district court's denial of summary judgment based on qualified immunity is an exception, and is reviewable after a trial on the merits").

Wichmann's citation to *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir. 1999) in support of a contrary conclusion is misplaced as *Hill* does not address the waiver issue raised by Wichmann in this case. *Hill* simply does not address whether a party's failure to take an interlocutory appeal of a pretrial denial of a sovereign immunity defense waives the defense and precludes a post trial appeal of the denial. Rather, the *Hill* court considered whether a defendant who waited "until the first day of trial before objecting to the federal court's jurisdiction on Eleventh Amendment grounds" waived its immunity defense. *Hill* at 756. The *Hill* court concluded that this delay could create "the opportunity for improper manipulation of the judicial process," and thus found that the defendant had waived its immunity claim. *Id.* at 758.

Unlike *Hill*, SIU has maintained its right to Eleventh Amendment immunity from the beginning of the proceedings, thereby giving "timely disclosure" and "fair warning to the plaintiff." *Id.* at 758. Unlike the defendant in *Hill*, SIU promptly asserted its immunity claim to the court and opposing counsel, allowing them sufficient time to consider this argument. Thus, the Ninth Circuit's decision in *Hill* is irrelevant to the issue of whether SIU's decision not to take an interlocutory appeal of the district court pretrial denial of its Eleventh Amendment sovereign immunity defense waived its defense and right to a pretrial appeal of the issue. Rather, the cases on this point uniformly conclude that the decision not to appeal pretrial denial of an immunity defense until after trial does not waive that defense.

SIU also questions the correctness of the Ninth Circuit's decision on the issue presented in *Hill*. Unlike the

Ninth Circuit's conclusion in *Hill*, other courts, including the Seventh Circuit below, have concluded that an Eleventh Amendment immunity defense may be raised at any point, including for the first time on appeal. *Wichmann v. Board of Trustees of Southern Illinois University*, 180 F.3d 791, 797 (7th Cir. 1999) (noting that "[s]tate sovereign immunity . . . may be raised by the State for the first time on appeal"). *Accord, Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1231 (10th Cir. 1999); *Harmon Industries v. Browner*, ___ F.3d ___, Case No. 98-3775, 1999 WL 718443, at *8 (8th Cir. 1999).

II. CONCLUSION

For the foregoing reasons, this Court should reject Wichmann's arguments and grant SIU's Petition for a Writ of Certiorari, and/or should hold SIU's Petition pending this Court's decision in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir.), *rehearing en banc denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (U.S. Jan. 25, 1999), and dispose of SIU's petition in accordance with this Court's decision therein.

Respectfully submitted,

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In the Supreme Court of the United States

BOARD OF TRUSTEES OF
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v.

THEODORE F. WICHMANN
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 180 F.3d 791. The memorandum opinion and order of the district court (Pet. App. 58-63) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 7, 1999. The petition for a writ of certiorari was filed on September 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).[1] The ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See 29 U.S.C.

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[1] The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. III 1997). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. IV 1998). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. IV 1998). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum hiring ages and mandatory retirement ages, in both federal and state government employment. See, *e.g.*, 5 U.S.C. 3307, 8335 (1994 & Supp. IV 1998) (federal); 29 U.S.C. 623(j) (Supp. III 1997) (state).

626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * *, and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

2. Southern Illinois University employed respondent for twenty years, during which time he consistently received "glowingly positive" evaluations. Pet. App. 1-2. In 1994, the University terminated respondent and redistributed his responsibilities to younger faculty members. *Id.* at 2-4. The University contended that the firing "was to resolve a budget deficit." *Id.* at 2. A University accountant testified, however, that no positions were eliminated by respondent's discharge and that the program's financial position was "in fact jeopardized" by respondent's dismissal. *Id.* at 3, 4.

Respondent filed suit in federal district court alleging that petitioner had fired him from his job on the basis of age, in violation of the ADEA. Pet. App. 4. Petitioner moved to dismiss on the ground of Eleventh Amendment immunity. *Id.* at 58. The district court denied the motion to dismiss. *Id.* at 58-63. Petitioner chose not to seek an interlocutory appeal of that judgment, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), but instead chose to proceed to trial. A jury entered a verdict in favor of respondent and found that the ADEA violation was "willful." Pet. App. 41. The court awarded back pay and ordered respondent reinstated. *Id.* at 39-40.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. The court of appeals affirmed. Pet. App. 1-28.

The court of appeals "reaffirm[ed] [its] previous view" that the ADEA validly abrogated Eleventh Amendment immunity. Pet. App. 6. First, the court concluded (*id.* at 7) that Congress made its intent to abrogate Eleventh Amendment immunity "unmistakably clear" in the ADEA. The court of appeals also held that the ADEA was appropriate remedial legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. The court concluded that the ADEA was "not particularly intrusive," because it was "limited to a 'discrete class' of state laws and actions, viz., those concerning age criteria for public employment" and "impos[ed] no affirmative obligations on the states." *Id.* at 12-13 (citation omitted). In "view of its relative lack of intrusiveness," the court found that the statute was a proportional response to the factual findings "embodied * * * in the statute" from which Congress could have "properly concluded that application of the ADEA to public employment is necessary to remedy or deter constitutional violations." *Id.* at 13-14.

ARGUMENT

On January 25, 1999, this Court granted review in *United States* v. *Florida Bd. of Regents*, 119 S. Ct. 902 (No. 98-796), and *Kimel* v. *Florida Bd. of Regents*, 119 S. Ct. 901 (No. 98-791). Oral argument was heard in those cases on October 13, 1999. As petitioner acknowledges (Pet. 5), the questions of abrogation of Eleventh Amendment immunity under the ADEA raised by this petition are identical to those presented in Nos. 98-796 and 98-791. Accordingly, this petition should be held

pending the Court's decision in those consolidated cases.[2]

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, and disposed of in accordance with the decision in those cases.

Respectfully submitted.

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NOVEMBER 1999

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[2] Petitioner first requests (Pet. 5, 16-17) that its petition be granted and the case consolidated with the *Florida Board of Regents* cases. Because the petition was not filed until shortly before the petitioners' reply briefs were filed and because oral argument has already been completed, consolidation is not a viable option.